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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1062

MAXWELL DARKS and MARVIN OLIVO,
Petitioners,

VERSUS

TRANSOK PIPE LINE COMPANY,
An Oklahoma Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January, 1978

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No. .....

MAXWELL DARKS and MARVIN OLIVO,
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TRANSOK PIPE LINE COMPANY,
An Oklahoma Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Final Order of the United States Court of Appeals Tenth Circuit of November 14, 1977, with Order denying rehearing on December 12, 1977, in case styled Transok Pipe Line Company, Plaintiff-Appellee -vs- Maxwell Darks, Marvin Olivo, Agnes Lucas, now Wesley, Defendants-Appellants No. 76-1972.

ORDERS FROM THE CASE BELOW

(See Appendix B)

ORDERS FROM THE U. S. DISTRICT COURT

(1) Order of July 24, 1973, denying Motion of Petitioner Darks (Defendant below) to present testimony in seeking a temporary restraining order and a temporary injunction to stop the trespass of Respondent to construct the underground gas storage warehouse and further Ordering that the Respondent (Plaintiff below) has the lawful right to take the property under eminent domain. (App. B, p. B-1)

(2) Order of Sept. 10, 1973, denying Election of Petitioner Darks to participate in the construction of the underground gas storage warehouse. (App. B, p. B-9)

(3) Order of Sept. 10, 1973, denying proposed instructions to be submitted to the commissioners on their appraisement. (App. B, p. B-10)

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(6) Order of November 16, 1973, overruling Exceptions to Commissioners Report. (App. B, p. B-19)

(7) Order of May 2, 1974. (App. B, p. B-21)

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(11) Order of Dec. 31, 1974, defining Surface Owner and Mineral Owner. (App. B, p. B-30)

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(15) Journal Entry of Judgment and Order of Distribution of Aug. 22, 1975. (App. B, p. B-56)

(16) Order of Dec. 31, 1975, granting Plaintiff's (Respondent herein) Motion for New Trial. (App. B, p. B-63)

(17) Order of May 12, 1976, denying Motion of Petitioner Darks (Defendant below) to file Counter-Claim for trespass damages. (App. B, p. B-73)

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(See Appendix C, Unreported)

(1) Order No. 96,291, dated March 5, 1973, by the Corporation Commission of Oklahoma in case No. 35,868. (App. C, p. C-1)

(2) Order of November 21, 1974, in Oklahoma State District Court of Hughes County, No. 73-93 (D.Ct.), 48,054 (S.Ct.) consolidated with other cases. (App. C, p. C-7)

(3) Order of the Supreme Court of Oklahoma of Sept. 8, 1975, in Cases No. 48,708 and 48,709. (App. C, p. C-9)

(4) Order of the Supreme Court of Oklahoma of December 9, 1975, in Cases No. 48,708 and 48,709. (App. C, p. C-10)

(5) Orders of the Supreme Court of Oklahoma denying Writ of Certiorari on November 16, 1977, in State Court Case No. 73-93 (D.Ct.), 48,054 (S.Ct.). (App. C, p. C-10)

STATUTORY PROVISION CONFERRING JURISDICTION ON APPEAL

The Final Order of the United States Court of Appeals, Tenth Circuit, was entered on November 14, 1977, with order denying rehearing on December 12, 1977. (App. B, pp. B-81 thru B-94)

This Petition seeking Writ of Certiorari was filed within 90 days from the last date invoking this Court's jurisdiction under 62 Stat. 928, 28 U.S.C. § 1254(1). (App. A, p. A-6)

QUESTIONS PRESENTED FOR REVIEW

The following substantial federal questions are presented in the Writ of Certiorari requiring plenary consideration, to-wit:

(1) Lack of jurisdiction because Certificate and Order No. 96-291, issued on March 5, 1973, by the Corporation Commission of Oklahoma, in Case No. 35,868, is void *ab initio* and void on its face. The Certificate does not meet the requirements of 56 Stat. § 83 and 61 Stat. § 459, of [15 U.S.C. § 717f(c) and (h)], or 52 O.S. § 36.3(b) and 36.4(b). Nor does the United States District Court have jurisdiction to hear this proceeding under 31 Stat. § 1084 (25 U.S.C. § 357), inasmuch as there is not a single Indian Allottee owning any interest in the land in controversy, only restricted Indian heirs of the Allottee and unrestricted individuals such as these Petitioners, nor was service of notice of the proceedings served on the Secretary of Interior, legal guardian of the restricted Indians, as required by Federal Rule 4(d)(5).

(2) Respondent was permitted to take the land of Petitioner Darks under an irrebuttable presumption of his right to do so. The Federal District Court refused to allow evidence of trespass and prior taking contrary to Art. 2, § 24, Constitution of Oklahoma, at the hearing to determine the Necessity of Taking on July 24, 1973. Such taking prior to appraisement by the commissioners and payment of interim compensation, is not permitted under 66 O.S. §§ 53-54.

(3) Petitioner Darks was not permitted to participate in the ownership and construction of the underground gas storage warehouse in violation of Art. 2, § 23, Constitution

of Oklahoma. He expressed his intent to do so on July 24, 1973. This desire to participate was again expressed in a pleading filed on July 30, 1973, and in the Exceptions to Commissioners Report on October 26, 1973.

(4) Petitioner Darks was not permitted to take depositions of the commissioners nor was he allowed to question them at an evidentiary hearing after appraisement of the land. Such request being set out in the Objections to the Commissioners Report filed on October 26, 1973, overruled on November 16, 1973.

(5) The commissioners did not consider any subsurface damages except an undescribed "royalty" interest in the gas in place, as reflected by their return filed October 1, 1973. Nor was the jury permitted to consider subsurface damages other than an undescribed "royalty" on the gas condemned in the first jury trial on August 25 and 26, 1975, and in the second jury trial on May 20 and 21, 1976. The commissioners and the two juries permitted to consider only damages across the visible surface in connection with ingress and egress to operate the subsurface warehouse facility and value for a part of the gas appropriated in the underground warehouse. No value was given for the underground warehouse being condemned and described in 52 O.S. § 36.3(c).

Said ruling was invalid by reason of repugnancy to due process and equal protection of the law under Art. 2, § 7, § 23 and § 24, Constitution of Oklahoma, and Amendment V, Amendment VII and Amendment XIV, Sec. 1, Constitution of the United States and said rulings further constituting denial of other federal rights.

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STATEMENT OF THE CASE

The Petition for Writ of Certiorari seeks review of two actions in trespass and one condemnation action. One action in trespass is because of damages to Petitioner Darks' land. The other trespass action is because of damages to cattle owned by Petitioner Darks and a partner, Les Starks. Mr. Starks is not a party to any of the condemnation proceedings and was never served with summons.

Respondent made entry in trespass and caused damages prior to the time for authorized entry provided in 66 O.S. § 53. Respondent continued to occupy the land in trespass after the unlawful entry until Respondent obtained "color of title" at the time specified for authorized entry under the condemnation laws of Oklahoma.

The condemnation proceedings are authorized under 52 O.S. §§ 36.1-36.7 and 66 O.S. §§ 51-55.

For purposes of this Petition for Writ of Certiorari Petitioner Darks and Olivo will be referred to as Petitioners unless it is necessary to denote which Petitioner filed a particular pleading or performed a particular act.

(1) *Lack of Jurisdiction*

Corporation Commission Case 35,868

On October 25, 1972, Respondent filed Case No. 35,868 before the Corporation Commission of Oklahoma seeking to obtain an order and certificate that an area consisting of approximately 3,660 acres of real property was suitable for the underground storage of natural gas in the "Channel Booch Formation" situated in the matrix of the land ap-

proximately 2,500 feet below the surface in Hughes County, Oklahoma. 680 contiguous acres in the underground warehouse are owned by Petitioner Darks. 160 acres are owned by Petitioner Olivo.

A Certificate and Finding is required by 52 O.S. § 36.4 that (a) the underground stratum or formation sought to be acquired is suitable for the underground storage of natural gas and that its use for such purposes is in the public interest; and (b) for a determination of the amount of recoverable oil and native gas, if any, remaining therein. There is no finding in the certificate attached to the Petition of the recoverable gas in the formation as required by 52 O.S. § 36.4(b) (App. A, p. A-22); App. C, p. C-1).

Nor is there any finding or determination of the market value of the remaining gas in the warehouse as compared to the market value of the warehouse as required by 52 O.S. § 36.3(b) (App. A, p. A-20).

The Trial Examiner submitted his recommended findings to the Corporation Commission followed by its issuance of Order No. 96,291, on March 5, 1973. This order was treated as the Certificate required to be attached to the petition filed in the District Court seeking condemnation under 52 O.S. § 53.5 (App. C, p. C-1).

Appellee has neglected to obtain the required Certificate of Convenience and Necessity from the Federal Power Commission prior to the commencement and construction of the warehouse or the bringing of the condemnation as required for interstate gas transmission companies under 56 Stat. 83 (15 U.S.C. § 717 f(c)) and 61 Stat. 459 (15 U.S.C. 717 f(h)). (App. A, p.'s A-3, A-5)

District Court Case

The Respondent filed a Complaint with Oklahoma Corporation Commission Order No. 96,291 attached (App. C, p. C-1) in the United States District Court for the Eastern District of Oklahoma on June 25, 1973, styled Transok Pipe Line Co. vs. An easment, et al., No. 73-186. These cases seeking condemnation of an "Easement" for an underground gas storage warehouse under 52 O.S. §§ 36.1-36.7 and 66 O.S. §§ 51-55.

560 acres of land owned by Petitioner Darks were included in the companion State Court cases now on appeal to this Court. The 120 acres of land owned by Petitioner Darks (Tracts 1 & 2) and the 160 acres of land of Petitioner Olivo (Tract 6) were included in this case.

Petitioners were included herein by reason that they were owners in co-tenancy in land with restricted Indians, members of The Five Civilized Tribes, who were heirs of the original Indian allottees. Allegedly, this required all owners in those tracts to be condemned in the Federal District Court under 31 Stat. 1084, 25 U.S.C. § 357. It is not alleged or contended by Respondent (Plaintiff below) that the restricted Indians were, in fact, Allottees. (Ct. Apps. App., Vol. I, p. 1; App. A, p. A-5)

The Petitioners herein are male Caucasians. The Secretary of Interior, guardian of the Indians, was not served with notice and summons as required by Federal Rule 4(d)(5).

If the court had jurisdiction of the Petitioners herein such Pendent Jurisdiction was lost on August 22, 1975,

when the United States Attorney, representing the restricted Indian heirs, agreed to a Journal Entry of Judgment and Order of Distribution in behalf of such restricted Indian heirs. This Order prior to the first jury trial herein on August 25 and 26, 1975. (App. B, p. B-56)

(2) ***Abuse of Discretion by the District Court—Petitioner Darks was not permitted to offer evidence in support of his request for a Temporary Restraining Order and Temporary Injunction at the hearing on July 24, 1973. There was no necessity for the Taking in Condemnation.***

Petitioner Darks filed a *verified* Objection to Any Finding that Respondent has the Power of Eminent Domain on July 11, 1973, which included an assertion of trespass by Respondent with resulting damages. This pleading also requested a Temporary Restraining Order and a Temporary Injunction. (Ct. Apps. App., Vol. I, p. 34)

At the hearing on July 24, 1973, Petitioner Darks made offer of proof of trespass unto his land prior to time of authorized entry under Art. 2, § 24, Constitution of Oklahoma and 66 O.S. § 53. This offer of proof commencing at page 73 in the Transcript of Testimony of this hearing. (Ct. Apps. App., Vol. II, p. 242)

Such offer overruled in the Order of July 24, 1973. (App. B, p. B-1)

The underground warehouse was completed and in operation prior to time of authorized entry in condemnation under 66 O.S. § 53. The date of authorized entry, October 1, 1973, being the date used for purposes of computation of market value of the land taken.

The following evidence was received in the record on July 24, 1973, from Mr. Robert L. Lawrence, Chief Counsel for Respondent. Commencing at line 13, page 69, Transcript of Testimony (Ct. Apps. App., Vol. II, p. 242) Mr. Lawrence testimony is as follows:

"BY MR. DARKS

Q. Are your compressor stations working out there, at this time?

A. The pressure station is completed, that is correct."

The denial of a meaningful hearing at a meaningful time prior to the taking of the property and damages denies Petitioner Darks due process and equal protection of the law required under *Fuentes* v. *Sherin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), and *North Georgia Finishing, Inc.* v. *Di-Chem.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

Thereafter, Judge Joseph W. Morris entered the Third Pre-Trial Order of August 26, 1974. This order instructed Petitioner Darks not to introduce any evidence of trespass damages at the approaching jury trial. (App. B, p. B-27)

The State Court Judges also refused to hold a hearing on the verified application of Petitioner Darks requesting a restraining order and injunction to halt the trespass and resulting damages to contiguous land and cattle thereon. These cases being companion cases in which Petitioner Darks was a defendant therein. The State Judges also stated that the trespass actions were separate causes of action. (App. C, p. C-7)

Trespass Action Filed and Dismissed by Supreme Court

With no remedy available in any of the cases described for continuing trespass damages, Petitioner Darks did as the Honorable Bob Howell and the Honorable Rudolph Hargrave (State Court) and the Honorable Fred Daugherty and the Honorable Joseph W. Morris (Federal District Court) instructed him to do if he desired relief for the continuing trespass. On November 24, 1974, he filed an action for trespass damages to his land. Petitioner Darks and Les Starks (cattle partnership) filed a cause of action for damages to cattle. Both cases seek actual and exemplary damages.

Temporary restraining order or injunction was not now sought because Respondent had succeeded in delaying the filing of the trespass actions until they obtained "color of title" and right of possession under the procedure described in 66 O.S. § 53. Further, Petitioner Darks was not financially able to post bond for the large volume of "put" or "take" gas in and out of the completed warehouse.

Respondent then reversed its position and filed a petition seeking Writ of Prohibition with the Supreme Court of Oklahoma on these cases for trespass and damages alleging that they should be heard in the condemnation cases. The court issued Writs of Prohibition on September 8, 1975, with rehearing denied on December 9, 1975. (App. C, p. C-10)

With no instructions from the court as to where the trespass cases would proceed, Petitioner Darks included a request for trespass damages in his Motion for New Trial

filed on September 18, 1975, in this condemnation case brought in the Federal District Court under 25 U.S.C. § 357.

On December 31, 1975, Honorable Joseph W. Morris refused to allow evidence in the federal district case of trespass damages at the second jury trial after having made the same ruling at the first jury trial. The reason stated for his refusal being the same reason stated earlier by Honorable Fred Daugherty in his refusal to hear testimony of trespass on July 24, 1973, in connection with granting of a restraining order or injunction—that the trespass damages is a separate cause of action. (App. B, p. B-63)

Petitioner Darks filed a petition seeking Writ of Certiorari with this Court on March 5, 1976, in Case No. 75-1256, the petition seeking remedy because of the Final Order from the Supreme Court of Oklahoma in the companion trespass cases denying remedy for trespass. The Writ of Certiorari was denied on April 26, 1976.

In *Young* v. *Seaway Pipeline, Inc., et al.*, decided December 20, 1977, reported in 48 Okla. Bar Journal, page 2791, the Supreme Court of Oklahoma states the following in the last paragraph of the decision, to-wit:

> "As for the matter of trespass, appellant relies exclusively on this Court's recent decision in Allen v. Transok Pipeline Company, Okl. 522 P2d 375 (1976). Such reliance is ill founded. Allen, supra, held inter alia, that where no prior condemnation proceedings had been commenced and one clothed with power of eminent domain enters upon the land, the land owner may under certain circumstances maintain a separate suit for damages by reason of the trespass. *In the case at bar, the petition alleges that a condemnation pro-*

> *ceedings is pending, thus limiting appellant to the assertion of his alleged damage resulting from trespass in the condemnation proceedings.*" (Emphasis ours)

The Respondent admittedly made entry onto the land of Petitioner Darks to construct the underground warehouse many months prior to October 1, 1973, the date they deposited a "lump sum" of money with the Court Clerk in a commingled account for unnamed land owners in this case. Under 66 O.S. § 53 this deposit gave them the right to make entry although this type of deposit did not enable the land owners to obtain "immediate receipt" of such interim payment as required by Art. 2, § 24, Constitution of Oklahoma, and 66 O.S. § 54. In fact, Respondent made no effort to divide this "lump sum" deposit or identify which part went to various owners until March 3, 1974. (Ct. Apps. App. Vol. I, p. 106)

This delay is specifying the amount of money for delivery to each of the various owners in violation of the letter and spirit of Rule 71(j), Federal Rules of Civil Procedure. (App. A, p. A-14)

On May 7, 1975, Petitioner Darks filed a Motion for Leave to File Counter-Claim herein with Cross-Petition attached in the second jury trial alleging trespass damages to land and cattle with a request for punitive damages. (Ct. Apps. App. Vol. I, p. 209) This was overruled by the Court on May 12, 1976. (App. B, p. B-73)

(3) *Petitioner Darks was not permitted to participate in the construction and ownership of the subsurface warehouse described in 52 O.S. § 36.3(c), a part of which is situated on his land.*

Abuse of Discretion by the Trial Court

Petitioner Darks was not permitted to participate in the ownership of the underground gas storage warehouse in violation of Art. 2, § 23, Constitution of Oklahoma. (App. A, p. A-15)

He expressed his intent to do so on July 11, 1973, in his verified Objections to Respondent's Power of Eminent Domain. (Ct. Apps. App., Vol. I, p. 34)

Petitioner Darks expressed his desire to participate verbally at the hearing on July 24, 1973. On July 30, 1973, he filed an Election to Participate which was overruled by the Court on September 10, 1973. (Ct. Apps. App., Vol. I, p. 44; App. B, p. B-9)

He again expressed his desire to participate in Paragraph VIII, Exceptions to Commissioners Report, filed on October 26, 1973, overruled by the Court without receiving evidence on Nov. 16, 1973. (Ct. Apps. App., Vol. I, p. 88; App. B, p. B-19)

It is herewith noted that the landowners are only allowed to file two pleadings under 66 O.S. § 55(A) as noted in the *Casteel* case. These pleadings are (1) Objections to Commissioners Report and (2) Request for Jury Trial, both filed *after* Respondent is allowed to take possession of the land without a meaningful hearing at a meaningful time to determine the Necessity for Taking. Such taking

also without a deposit or delivery of interim compensation to the *particular* landowner required by Art. 2, § 24, Constitution of Oklahoma, and 66 O.S. § 54.

Under the ruling in the *Casteel* case all pleadings filed herein are untimely if filed before October 26, 1973, the date Petitioner filed his Objections to Commissioners Report. The hearings held on July 24, 1973, to determine the Necessity for the Taking is untimely and unauthorized according to the *Casteel* case. The procedure outlined for condemnation in *County Comm's Creek Co.* v. *Casteel*, 522 P.2d 608, violates due process and equal protection of the law.

The evidence introduced by Respondent at the hearing on July 24, 1973, and the Order of that date, merely demonstrate that the underground gas storage warehouse is a very profitable facility. (App. B, p. B-1)

With this facility Respondent, or others, can "take" gas from its native reservoirs where contracts call for the leaseholder to "pay" or "take" the gas. This gas can then be stored in this man-made reservoir-warehouse without Respondent being required to "pay" approximately $250,000 per year under the "pay" part of their contracts for the privilege of storing the gas in its native warehouse until needed in the market place.

There is nothing in the evidence of the hearing on July 24, 1973, to demonstrate that the facility being condemned would operate any less efficiently if jointly owned by Respondent and Petitioner Darks, or anyone with the financial means to carry their part of the financial responsibilities.

It is herewith noted that the Bureau of Indian Affairs (an agency under the Secretary of Interior) was negotiating with the Respondent, prior to the time this condemnation action was filed, to lease the restricted Indians' part of the subsurface fee necessary for the warehouse.

Petitioner Darks was also negotiating with the Bureau of Indian Affairs for a long-term gas storage lease on the interest of the restricted Indians.

These negotiations conducted in behalf of the Indians through Attorneys representing the Secretary of Interior, Guardian of the Restricted Indians, based on recommendations made by the Bureau's Petroleum Engineer and Geologist.

(4) *Abuse of Discretion by the Trial Court—Petitioner Darks was not permitted to take deposition of the Commissioners or the Respondent. He was not permitted to cross-examine the Commissioners to determine their business relationship with Respondent and their method and reasons for the appraisement as requested in Objections to Commissioners Report. Nor was he permitted to take Interrogatories of the Respondent.*

The Respondent proposed three commissioners to the court to appraise the land. The proposed commissioners were the same commissioners used in the State Court cases, A. B. Cantrell, C. A. Moore and Binas Hostettler.

Petitioner Darks objected to these appraisers and alleged that A. B. Cantrell and C. A. Moore were doing business with the Respondent and the other commissioner, Binas Hostettler, an attorney, was an officer of the court.

Respondent wrote a letter to Judge Daugherty dated August 1, 1973, admitting they were negotiating a contract with Arbac Petroleum Co. but denied doing business with C. A. Moore in "Hughes County" where the underground warehouse is situated.

In a letter of August 7, 1973, Counsel for Petitioner Darks pointed out that A. B. Cantrell was President of Arbac Petroleum Company. Mr. Clyde Fuqua was appointed in his place.

On August 30, 1973, Petitioner Darks filed his requested instructions for the commissioners to appraise damages to (1) Surface, (2) Easement from the surface to the surface warehouse, (3) Subsurface warehouse and (4) 8/8ths of the minerals "in place" being condemned. (Ct. Apps. App., Vol. I, p. 45)

The court rejected these proposed instructions on September 10, 1973. (App. B, p. B-10)

In Paragraph IX of Petitioner Darks' Objections to Commissioners Report, it is alleged that C. A. Moore, one of the commissioners, was selling gas to Respondent thus disqualifying him to act as a commissioner. (Ct. Apps. App., Vol. I, p. 88)

In Paragraph XI therein, Petitioner Darks requested an evidentiary hearing where the commissioners could be examined concerning their business relationship with Respondent and also explain their REASONS used in arriving at its verdict on damages as required by 66 O.S. § 55(A).

On November 16, 1973, the court overruled all objections to Commissioners Report without an evidentiary hear-

ing to determine the REASONS for the appraisement on whatever was appraised. This ruling contrary to the ruling in *U. S.* v. *Merz*, 376 U.S. 192, 84 S.Ct. 639, 11 L.Ed.2d 692. (Ct. Apps. App., Vol. I, p. 94; App. B, p. B-19)

Petitioner Darks attempted to take deposition of the commissioners to determine their business relationship with Respondent under Rule 30(b), Federal Rules of Civil Procedure, but was enjoined from so doing by Order of the Court of October 31, 1973. The order stated to require the appraisers-commissioners to respond would constitute annoyance, embarrassment, oppression and undue burden and expense to them. (App. B, p. B-17)

Respondent gave Notice to Take Deposition under Rule 30(b)(6), Federal Rules of Civil Procedure, of employees of Respondent to determine Respondent's relationship with Arkansas-Louisiana Gas Company (ARKLA) in connection with Exchange Agreements and interstate transportation of natural gas. Such taking of depositions was enjoined on June 20, 1974, and July 19, 1974. (App. B, p. B-25)

Petitioner Darks gave Notice to Take Interrogatories of Respondent to determine their business relationship with the commissioners under Rule 33, Federal Rules of Civil Procedure. Such request prohibited by the court in its Order of September 5, 1974. (App. B, p. B-29)

(5) ***Abuse of Discretion by the Trial Court—The Commissioners and the Jury in the First Jury Trial and the Second Jury Trial were only permitted to consider damages of ingress and egress across the visible surface and an unstated royalty interest in the oil and gas situated in the subsurface gravel and rock.***

In *Grand River Dam Authority, A Public Corporation* v. *Grand-Hydro, A Private Corporation*, 201 P.2d 225, 335 U.S. 359, 69 S.Ct. 696, 93 L.Ed. 64 (1948), the Court states in part the following in connection with instructions for determining the measure of damages in condemnation cases in Oklahoma, to-wit:

> " 'In determining the market value of a piece of real estate for purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might in reason be applied, must be considered, and its value for the use which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test.' . . ."

Petitioner Darks attempted to have a Petroleum Engineer with expertise in the appraisement of this "unique" subject-matter appointed to assist the appraisers. Such request was overruled by the Court in its Order of September 10, 1973. (App. B, p. B-10)

The commissioners only appraised the (visible) surface and an undisclosed "royalty" interest in the minerals in place in the matrix. (Ct. Apps. App. VI, p. 81)

At both jury trials Petitioners attempted to introduce evidence by a qualified petroleum engineer as to value of the underground warehouse on the open market on October 1, 1973. The court repeatedly refused to allow evidence as to the value of the fee interest actually being condemned which is described in 52 O.S. § 36.3(c). (App. A, p. A-20)

Consumers Power Co. v. *Allegan State Bank*, 174 N.W. 2d 578 (1969), *aff'd* 202 N.W.2d 295 (Mich. 1969); and *Mid-Louisiana Gas Co.* v. *Sanchez*, 280 So.2d 406 (La. App. 1973), *cert. denied* 282 So.2d 142 (1973), are the latest authorities on underground gas storage damages in condemnation cases. These cases demonstrate that certain subsurface sands, formations or stratums have value in the marketplace for gas storage. Such interest are described in 52 O.S. § 36.3(c). These formations are entitled to consideration separately in computation of the amount of total damages.

Offer of proof by Counsel for Petitioner Olivo at the first jury trial on August 25 and 26, 1975, is typical of such offers throughout both trials. This offer is reflected in the Transcript of Testimony of the first jury trial commencing at line 19 of page 51 therein.

The offer of evidence as to the value of the underground warehouse made by a witness who is a petroleum engineer with expertise in the appraisement of underground gas storage warehouses. The offer stated seven reasons in support of the appraisement and stated that the market value of the subsurface warehouse in a sale between a willing seller and a willing buyer on October 1, 1973, was $12,600,000.00. The offer further showed that the value of that pro rata *volume* of the underground warehouse in

Tract 6 (Petitioner Olivo) had a market value of $549,-120.00. (See Ct. Apps. App., Vol. II, p. 281)

In connection with the land of Petitioner Darks, only 30 acres of his land—in this case—actually contained part of the warehouse described in 52 O.S. § 36.3(c). This 30 acres of Tract 1 contained a section of the warehouse approximately 80 feet thick in the "Channel Booch Sand." None of the reservoir is situated in Tract 2.

The petroleum engineer testified at the second jury trial on May 20 and 21, 1976, commencing at line 3, page 56 of the Transcript of Testimony, that one-half of this pro rata *volume* (Petitioner Darks' interest) of the warehouse had a market value of $200,920.00 on October 1, 1973.

The above offers of testimony were overruled and objections to subsequent testimony were sustained as demonstrated in the Transcript of Testimony of the second jury trial (line 22, p. 67), when the court sustained objection to this testimony as follows:

> "BY THE COURT: Ladies and gentlemen of the jury, the Court has just sustained an objection in this case as it related to the $200,920.00 which this witness ascribed for gas storage purposes to Tract Number 1. The jury is admonished not to consider that evidence, that evidence has been stricken. . . ."

BASIS FOR FEDERAL JURISDICTION

This case is filed in the United States District Court for the Eastern District of Oklahoma under 31 Stat. 1084, 25 U.S.C. § 357, alleging jurisdiction thereunder.

WHEN FEDERAL QUESTIONS WERE RAISED

Petitioner Darks raised violation of Amendment XIV, U. S. Constitution in his Objections to Any Finding that Respondent Has Power of Eminent Domain filed on July 11, 1973, in paragraph III therein.

Overruled by the court in its Order of July 24, 1973. (App. B, p. B-1)

Paragraph III therein as follows:

"III.

"That 52 O.S. 36.1 et seq., authorizing and allowing condemnation for the establishment of an underground gas storage warehouse is in violation of the 14th Amendment of the United States Constitution for the following reasons, to-wit:

(1) The prescribed procedure to acquire underground gas storage facilities is vague and places the burden of proof on the defendant by reason of the fact that the defendant must take affirmative action all through the proceedings to protect his property and rights thereunder which causes the defendant to spend money to protect his property without adequate remedy at law.

(2) By reason of the vague and inappropriate verbage in 52 O.S. §36.1 et. seq., the defendants

herein including Maxwell Darks and P. G. Parks have been subjected to having certain parts of their fee ownership in this gas storage project declared subject to Plaintiff's power eminent domain without due process of law in that an ex parte hearing was held in the cases covering this subject matter in Oklahoma District Court of Hughes County, without defendants being given notice, said cases being numbered C73-93, C73-94, C73-95, C73-96, C73-98, C73-99, C73-100, C73-101, C73-102. See Exhibits attached.

(3) That while the condemnation procedure describes the appropriating of fee ownership the procedure authorized for the appointment of commissioners to appraise the underground gas storage is the procedure authorized under 66 O.S. §53 which is the procedure whereby commissioners are appointed for the taking of an easement for railroad right-of-way only which does not provide a method for appraisement of a very valuable fee ownership, that of a underground gas storage warehouse facility, and the law does not provide for appraisal of the underground gas storage warehouse facility and to appraise such a facility would require commissioners with the expertise and knowledge to determine the fair market value of such a 'novel' and 'unique' facility, namely a petroleum engineer.

(4) That the rights guaranteed to the defendants under due process have been further violated by reason of misrepresentations made in the certificate originally issued by the Corporation Commission proceedings 35,968 describing the amount of gas remaining in the reservoir as 2 billion cubic feet when the testimony in the case as reflected at page 34 in the transcript of testimony reflects 3 billion cubic feet of gas remaining in the reservoir. Further, the

reports of the commissioners in the state court proceedings pay the owners of oil and gas in the channel booch sand ONLY for a Royalty instead of for an 8/8ths ownership of the gas remaining in the reservoir."

In Objections to Commissioners Report filed on October 26, 1973, Petitioner Darks raised violation of Amendments V and XIV, U. S. Constitution. (App. Ct. App., V.I, p. 88)

Overruled by the court in its Order of Nov. 16, 1973. (App. B, p. B-19)

Paragraphs VIII and XII therein are as follows:

"VIII.

"That these proceedings are void and should not be allowed to continue as to the Defendant Maxwell Darks, specifically, as he has evidenced his intent to participate as a joint owner in the gas storage project, and has also evidenced his desire to bid on the interest of the restricted Indians included herein at competitive bidding as authorized by public law 336 passed in 1947, being a violation of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution and all other pertinent state and federal laws.

* * * * * *

"XII.

"That the procedure for condemnation under Oklahoma law is unconstitutional under the Fifth and Fourteenth Amendment of the United States Constitution inasmuch as it allows the condemnor to own and take possession of the property in question before the legal proceeding for condemnation is completed or any compensation is paid to the owner and places the burden of litigation on the landowner."

Objections to violation of due process were raised in the first jury trial and the second jury trial when the court refused to allow evidence of the value of the subsurface gas storage warehouse described in 52 O.S. § 36.3(c). Mr. George Oliphant representing Petitioner Olivo and Counsel Michael Smith representing Petitioner Darks objected as set out commencing on the last line of page 66 in the Transcript of Proceedings of the second jury trial on May 20 and 21, 1976, as follows:

"MR. OLIPHANT: I wish to make—I am not in this case because of the order, and being an order that applies to my case, I wish to point out to the Court here we show a value of property and it violates the 14th Amendment because you are taking property without due process, even though this may be the rules of evidence and rules of the Court, the Constitution of the United States, the 14th Amendment—

MR. SMITH: And 5th Amendment.

MR. OLIPHANT: The highest law of the land, because you cannot take it without due process.

* * * * * *

MR. SMITH: Your Honor, I would make the same record, a violation of the 5th and 14th Amendments to the Constitution of the United States.

THE COURT: Very well.

(OPEN COURT)

THE COURT: Ladies and gentlemen of the jury, the Court has just sustained an objection in this case as it related to the $200,920, which this witness ascribed for gas storage purposes to Tract Number 1."

In the brief submitted by Petitioner Darks, to the United States Court of Appeals for the 10th Circuit, Federal Questions were raised as follows:

> (1) That the lower court's failure to allow Petitioner, Maxwell Darks, to present evidence as to the continuing trespass by Transok Pipeline Company at the hearing held by the court on July 24, 1973, violated Petitioner's right to due process of law under the 5th and 14th Amendments to the United States Constitution. (Brief, p. 20)
>
> (2) That the appropriation of this underground gas storage facility by Transok Pipeline Company constitutes a taking by a private corporation for a private purpose and constitutes a taking of private property for less than just compensation in violation of the 5th Amendment to the Constitution of the United States. (Brief, p. 22)
>
> (3) That the substantive and procedural law of the State of Oklahoma as to the taking of property by condemnation violates due process and equal protection of the law under the 5th and 14th Amendments to the United States Constitution. (Brief, pp. 22 and 23)

Petitioner Olivo, in his brief to the United States Court of Appeals for the 10th Circuit, raised the Federal Question as to whether the substantive and procedural law of the State of Oklahoma on eminent domain violates due process and equal protection of the law under the 5th and 14th Amendments to the United States Constitution. (Brief, p. 11) Overruled in the Order of Nov. 14, 1977. (App. B, p. B-81)

WHY FEDERAL QUESTIONS ARE SUBSTANTIAL

It is estimated that 20 condemnation actions are filed involving state condemnation law every day the courts are open for business throughout this country. These cases involve citizens' property rights as well as mental pain and suffering and millions of dollars in damages.

Many states, like Oklahoma, allow corporations to bring actions under antiquated laws. Many states still proceed under statutes sponsored by the railroads when the railroad barons were, in fact, our kings. The gas transmission companies use such condemnation laws to obtain pipeline rights-of-way, underground gas storage warehouses, etc.

Art. 2, § 7 and § 24, Constitution of Oklahoma, require a judicial determination on the Necessity for the Taking *prior* to the taking which would include an evidentiary hearing to determine if a restraining order or injunction should be issued to halt the invasion and taking prior to time for authorized entry under 66 O.S. § 53 or the payment of compensation under 66 O.S. § 54. Such was not the procedure in this case, nor is it the procedure in any condemnation case in Oklahoma today.

The commissioners were not required to appear at an evidentiary hearing to explain in the presence of the Petitioners the method of appraisement or what was actually appraised. The appraisement is secret, as far as the condemnee is concerned with the reasons for the appraisement known only to the court, the commissioners and the condemnor. This is tantamount to having a third-party stranger

sign the deed to the property belonging to the landowner with the landowner having no recourse or remedy. It is further alleged that one of the commissioners was doing business with the Respondent while appraising the land of Petitioners. Petitioner Darks was not permitted to obtain evidence on this point.

The owner is defeated under the legal maxim "possession is 9 points of the law" without an evidentiary hearing. This procedure clearly demonstrates that another legal maxim—condemnation proceedings will be strictly construed against the condemnor—is strictly a legal myth.

The conglomerate corporation is permitted to proceed unobstructed in this case under an irrebuttable presumption of their right to invade and trespass and take in condemnation in violation of equal protection of the law. Petitioners have been denied remedy.

It is noted that because of the trespass prior to the time of authorized entry under 66 O.S. § 53, which in this case was October 1, 1973, the underground warehouse was completed on that date. Therefore, Petitioners were the owners of their pro rata part of a "new" underground gas storage warehouse on that date and are entitled to compensation based on that fact.

The Legislature and the courts have fractured Petitioners "one" day in court under due process into a series of cases involving treadmill litigation to nowhere in order to destroy the financial and emotional ability of the landowners to resist the taking of their land.

The procedure under 52 O.S. §§ 36.1-36.7 and 66 O.S. §§ 51-55 requires proceedings first in the Corporation Commission of Oklahoma followed by condemnation proceedings in the district court as set out under 52 O.S. § 36.5. The Oklahoma courts have construed 66 O.S. § 55 in such a way in the *Casteel* case that no counterclaim or answer can be filed by the defendants therein. Thus the landowners, who are the Petitioners in this case, are denied remedy under 12 O.S. § 1396. Under this ruling 12 O.S. § 1396 is inoperative to defend the landowner against the malicious invasion and trespass of Respondent. The landowner must file a third cause of action in which he is no longer the defendant to request a restraining order and injunction, *ad infinitum*. This procedure prevents a hearing to obtain a temporary restraining order or injunction in the condemnation action filed under 52 O.S. § 36.5.

Respondent has been allowed to take property of Petitioners without a meaningful hearing at a meaningful time. Further, there has not been a meaningful hearing at a meaningful time to determine the reasons used in the taking and in the determination of damages by the commissioners.

Actually, the court is allowing the Respondent to confiscate an easement from the surface to the subsurface warehouse at approximately -2,500 feet, the subsurface warehouse described in 52 O.S. § 36.3(c) and the minerals in place except for an undisclosed royalty interest therein.

This procedure allows the gas transmission company to be elevated to a position of primacy and prestige exceeding the supreme sovereign, the United States of America, from which the right of condemnation springs. The sov-

ereign was directed to pay for the underground gas storage facilities in *Emeny* v. *U. S.*, 412 F.2d 1319 (1969).

In *Grand River Dam Authority* v. *Grand Hydro*, a public corporation was taking property of a private corporation for a public use. This Court allowed damages based on ". . . the possibility of its use for all purposes, present and prospective. . . ."

If a public corporation has to pay a private corporation on this basis, then to deny individual owners the same standard of damages would be to deny equal protection of the law.

Individuals do own interest in underground gas storage warehouses throughout the United States but many states now allow the Gas Tranmission Companies to condemn them if the corporations think it is to their financial advantage. Gas Transmission Companies also lease underground gas storage warehouses using the threat of condemnation if the landowner does not capitulate and agree to their offer.

In *Stork, et al.* v. *Cities Service Gas Co.*, Vol. 48 Okla. Bar Journal, p. 2632, No. 48,789, decided Nov. 22, 1977, the landowners alleged that Cities Service Gas Co. used threats of condemnation if the landowners did not agree to their offer to lease certain land for gas storage purposes. In the last paragraph of column 1 on page 2633 in this case the Court states the following:

> "The gas storage lease was negotiated, in part, on the premises parties could thereby avoid a lawsuit to condemn the underground strata. Cities Service's landman, from the beginning of the lease negotiations, informed Storks that condemnation proceedings would be had if

> the lease was not concluded. We will not say Storks, by entering into the lease in lieu of condemnation, divested themselves of protections available to them under condemnation statutes in the facts of this case."

The due process questions as to how the taking occurred in this case before the Court and in the *Storks* case are as old as civilization itself. The foregoing method of taking by harassment and the brutalization of the individual landowner under the condemnation laws are the prevailing law in Oklahoma and other states today. Corporations in Oklahoma use these barbarian tactics in dealing with individual landowners while ignoring Art. 2, § 7 and § 24, Constitution of Oklahoma.

If Petitioners Darks and Olivo had proceeded to take the property of Respondent in the manner employed in acquiring this underground warehouse, felony charges would have undoubtedly been filed against them. There is no equal protection of the law in connection with individuals being brutalized by Conglomerate Gas Transmission Companies.

There is no decision in recent times by the Supreme Court of the United States establishing minimum guidelines for procedural and substantive due process and equal protection to protect the property rights of individuals having their property involuntarily taken from them by a corporation allegedly cloaked with the power of eminent domain. In the state court, Respondent relies on *Bailey* v. *Anderson*, 326 U.S. 203, 90 L.Ed. 3, 66 S.Ct. 66 (1945), decided some 27 years prior to *Fuentes* and not germane to this case.

This case presents a substantial federal question of great import to Petitioners and others similarly situated procedurally and/or substantively throughout the United States now and in the future. The procedure used herein applies generally in all types of condemnation cases, not just condemnation of underground gas storage warehouses. However, underground gas storage warehouses are now being acquired in significant numbers throughout the United States.

Condemnation litigants ordinarily lack the financial means, emotional staying power and expertise to appeal or protest similar takings. Therefore their only remedy is to buckle under because of the awesome power of the conglomerate gas transmission company, or rebel against removal of their equal protection and due process rights under our Constitution. These procedural deficits herein cannot be corrected by a jury trial to determine damages. By the time prescribed for a jury trial, the landowners are financially and emotionally prostate in attempting to defend from the involuntary taking of their land.

For purposes of argument let us assume that there are occasions where an emergency arises requiring the federal, state or local government to invade property without notice or an evidentiary hearing to determine the need to act. Such is not the case before the Court. The only case before the Court is the case of an overbearing and ruthless conglomerate that has proceeded to plunder Petitioner's emotions and property strictly for profit. The underground warehouse would operate just as efficiently with Petitioner Darks, or others, participating therein.

Petitioners have been denied remedy and it would be grossly unjust to require the Petitioners to be subjected to further treadmill litigation to nowhere. Their due process rights have been violated in a harsh manner by abusive procedure and arbitrary and capricious rulings by the court tantamount to cruel and unusual punishment. The rulings are repugnant to Art. 2, § 7, § 23 and § 24, Constitution of Oklahoma, and Amendments V, VII and XIV, Sec. 1, United States Constitution.

31 Stat. § 1084, 25 U.S.C. § 357 is unique in condemnation because this statute requires "in rem" and "in personam" jurisdiction. If you are not the original (1) Allottee still (2) owning the allotment, then this statute does not apply to other owners whether restricted or non-restricted. It was passed in 1901 when most of these native Americans did not speak, read or write English.

Time has eliminated the need for this statute to be employed to protect the original allottees. It is now being used as a weapon against restricted Indian heirs and non-restricted landowners who would much prefer to litigate a state question in a less expensive and more convenient setting in the state district court closer to their homes and land. The defendants below were required to travel approximately 100 miles from their homes to Muskogee, Oklahoma, to litigate.

Judicial economy, convenience and fairness required that this case be litigated in the state court closer to the homes of the poorer litigants. The inconvenience to the poorer litigants is obvious and most unfair, particularly to Petitioner Darks who has been required to litigate the

taking of his fee interest in numerous state court cases and this case in federal court. Jurisdiction, pendent or otherwise, is not bottomed on any solid legal principle other than the fact that Respondent wanted to make it as difficult as possible for the landowners to defend their land.

Cases believed to sustain jurisdiction of the Court are the following:

—*Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972);

North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975);

United States v. *Merz, et al.*, 376 U.S. 192, 84 S.Ct. 639, 11 L.Ed.2d 629 (1964);

Grand River Dam Authority v. *Grand-Hydro*, 335 U.S. 359, 69 S.Ct. 114, 93 L.Ed. 64 (1948).

REQUEST FOR DISTRICT COURT CLERK TO CERTIFY AND TRANSMIT RECORD

Request has been made to the Court Clerk for the United States District Court for the Eastern District of Oklahoma to Certify and Transmit those parts of the record deemed pertinent to this request for Writ of Certiorari. (App. D, p. D-1)

CONCLUSION

The condemnation action should be dismissed with prejudice. A permanent injunction should be issued against Respondent forbidding further trespass and confiscation over, under or in Petitioners' land. If the Court determines that Petitioners' due process and equal protection have not been violated, prior to jury trial, then this case should be remanded to the District Court for jury trial on the question of damages including subsurface damages under 52 O.S. § 36.3(c). Further, the trespass action should be remanded to the lower court with instructions for the lower court to allow Petitioner Darks to proceed with his action in malicious trespass, with a request for punitive damages.

Respectfully submitted,

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Attorneys for Petitioners

January, 1978

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for Writ of Certiorari were mailed on this ..... day of January, 1978, first class postage fully prepaid, to:

1. Solicitor General
   Department of Justice
   Washington, D.C. 20530

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APPENDICES

APPENDIX A

(1) U.S. CONST., amend. V, Due Process Clause [U.S.C.A. Const. Amend. V, p. 4]

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2) AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

(3) U.S. CONST., amend. XIV, Sec. 1 [U.S.C.A. Const. Amendments 13 to 14, p. 33]

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(4) 52 Stat. 824 (15 U.S.C. §717), 56 Stat. 83 (15 U.S.C. § 717f(c)), 61 Stat. 459 (15 U.S.C. § 717f(h)) [15 U.S. C.A. 141, pp. 384, 385, 386]

15 U.S.C. NATURAL GAS § 717

§ 717f. Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transporation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under the rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. June 21, 1938, c. 556, § 7, 52 Stat. 824; Feb. 7, 1942, c. 49, 56 Stat. 83; July 25, 1947, c. 333, 61 Sat. 459.

25 U.S.C. INDIANS

(5) 31 Stat. 1084 (25 U.S.C. § 357), [25 U.S.C.A., p 426]

§ 357 Condemnation of lands under laws of States

Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Mar. 3, 1901, c. 832, § 3, 31 Stat. 1084.

28 U.S.C. JUDICIARY AND JUDICIAL PROCEEDINGS

(6) 62 Stat. 928 (28 U.S.C. § 1254) [28 U.S.C.A., § 1251, p. 49]

§ 1254. Courts of appeals; certiorari; appeal, certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

(7) FEDERAL RULES

1975 Edition West Publishing Co., pp. 32 and 33; Rule 4(d)(5)

(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of

the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

p. 56; Rule 19.

(8) JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be Joined is Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a jdugment rendered in the person's absence might be prejudicial to him or those already par-

ties; second, the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

As amended Feb. 28, 1966, eff. July 1, 1966.

p. 58; Rule 21.

(9) MISJOINDER AND NON-JOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rule 30.

(10) DEPOSITIONS UPON ORAL EXAMINATION

(a) When Depositions May be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as

provided in subdivision (b) (2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of Examination: General Requirements; Special Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subdivision (b) (2) he was unable through the exercise of diligence to obtain counsel to represent him at

the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.

(c) Examination and Cross-Examination; Record of Examination; Oaths; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence.

The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b) (4) of this rule. If requested by one of the parties, the testimony shall be transcribed. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

Rule 33.

(11) INTERROGATORIES TO PARTIES

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making

them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

As amended Dec. 27, 1946, eff. March 19, 1948; March 30, 1970, eff. July 1, 1970.

1970 Amendment

Added to and modified existing provisions. Prior to the amendment the Rule provided:

"Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

"Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The

number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule."

Rule 71A.

(12) CONDEMNATION OF PROPERTY

* * * * * *

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

* * * * * *

(j) DEPOSIT AND ITS DISTRIBUTION. The plaintiff shall deposit with the court any money required by law as a

condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the overpayment.

(k) CONDEMNATION UNDER A STATE'S POWER OF EMINENT DOMAIN. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

OKLAHOMA CONSTITUTION

(13) OKLA. CONST. art. 2, Bill of Rights § 7 Okl. Stats. 1971 Official Ed. p. 54 [O.S.A. Const. Art. 2, § 7, p. 425]

§ 7. Due process of law

No person shall be deprived of life, liberty, or property, without due process of law.

(14) OKLA. CONST. art. 2, Bill of Rights § 23.1 Okl. Stats. 1971 Off. Ed., p. 64 [O.S.A. Const. Art. 2, § 23, p. 822]

§ 23. Private property—Taking or damaging for private use

No private property shall be taken or damaged for private use, with or without compensation, unless by consent

of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law.

(15) OKLA. CONST. art. 2, Bill of Rights, § 24.1 Okl. Stat. 1971 Off. Ed., p.65 [O.S.A. Const. Art. 2, § 24, p. 827]

§ 24. Private property.—Public use—Character of use a judicial question

Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.

12 Ok. St. CIVIL PROCEDURE

(16) 1 Okl. Stats. 1971 Official Ed., p 912 [12 Okl. St. Ann. § 1, p 15]

§ 3. Division of remedies

Remedies in the courts are divided into:

First, Actions.

Second, Special proceedings, R.L. 1910, § 4643.

(17) 1 Okl. Stats. 1971 Official Ed., p 912 [12 Okl. St. Ann. § 1, p 17]

§ 4. Action defined

An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. R.L. 1910, § 4644.

(18) 1 Okl. Stats. 1971 Official Ed., p 912 [12 Okl. St. Ann. § 1, p 20]

§ 5. Special proceedings

Every other remedy is a special proceeding. R.L. 1910, § 4645.

(19) 1 Okl. Stats. 1971 Official Ed., p 1083 [12 Okl. St. Ann. § 1381, p 7]

§ 1382. Cause for injunction—Temporary injunction.

When it appears, by the petition, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it appears that the defendant

is doing, or threatens, or is about to do or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when, during the pendency of an action, it shall appear, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, or to render the judgment ineffectual, a temporary injunction may be granted to restrain such removal or disposition. It may, also, be granted in any case where it is specially authorized by statute. R.L. 1910, § 4867.

(20) 1 Okl. Stats. 1971 Official Ed., p 1084 [12 Okl. St. Ann. § 1381, p 50]

§ 1383. When and by whom injunction granted—Affidavit showing right to

The injunction may be granted at the time of commencing the action, or any time afterwards, before judgment by the district court, or the judge thereof, or, in his absence from the county or disqualification, by the county judge, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto. R.L. 1910, § 4868.

(21) 1 Okl. Stats. 1971 Official Ed., p 1084 [12 Okl. St. Ann. § 1381, p 54]

§ 1384. Notice to adverse party—Temporary restraint

If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose, at a specified time and place, and may, in the meantime, restrain such party. R.L. 1910, § 4869.

(22) 1 Okl. Stats. 1971 Official Ed., p. 1086 [12 Okl. St. Ann. § 1381, p 77]

§ 1396. Injunction by defendant.—A defendant may obtain an injunction upon an answer, in the nature of a counterclaim. He shall proceed in the manner hereinbefore prescribed. R.L. 1910, § 4880.

(23) 2 Okl. Stats. 1971 Official Ed., p 3072 [52 O.S.A. § 1, p 31]

52 O.S., GAS COMPANIES AND PIPE LINES
UNDERGROUND STORAGE OF GAS

§ 36.1 Definitions

As used in this Act[1] (a) "underground storage" shall mean storage in a subsurface stratum or formation of the earth; (b) "natural gas" shall mean gas either while in its original state or after the same has been processed by removal therefrom of component parts not essential to its use for light and fuel; (c) "native gas" shall mean gas which has not been previously withdrawn from the earth; (d) "natural gas public utility" shall mean any person, firm or corporation authorized to do business in this State and engaged in the business of transporting or distributing natural gas by means of pipe lines into, within or through this State for ultimate public use; (e) "commission" shall mean the State Corporation Commission.
Laws 1951, p. 134, § 1, eff. May 26, 1951.

(24) 2 Okl. Stats. 1971 Official Ed., p 3073 [52 Okl. St. Ann. § 1, p 32]

§ 36.2 Public interest and welfare

The underground storage of natural gas which promotes conservation thereof, which permits the building of reserves for orderly withdrawal in periods of peak demand, which makes more readily available our natural gas re-

sources to the domestic, commercial and industrial consumers of this State, and which provides a better year-round market to the various gas fields, promotes the public interest and welfare of this State.

Therefore in the manner hereinafter provided the commission may find and determine that the underground storage of natural gas as hereinbefore defined is in the public interest.

Laws 1951, p. 134, § 2, eff. May 26, 1951.

(25) 2 Okl. Stats. 1971 Official Ed., p 3073 [52 Okl. St. Ann. § 1, p 33]

§ 36.3 Condemnation of subsurface stratum or formation—Operation of storage facilities—Limitations

Any natural gas public utility may condemn for its use for the underground storage of natural gas any subsurface stratum or formation in any land which the commission shall have found to be suitable and in the public interest for the underground storage of natural gas, and in connection therewith may condemn such other interests in property as may be required adequately to examine, prepare, maintain and operate such underground natural gas storage facilities; provided, however, that the right of condemnation of underground sands, formations and strata, granted hereby, shall be limited as follows:

(a) No sand, formation, or stratum which is producing or which is capable of producing oil in paying quantities, through any known recovery method, shall be subject to appropriation hereunder;

(b) No gas bearing sand, formation, or stratum shall be subject to appropriation hereunder, unless the volumes of native gas originally in place therein shall be shown to be substantially depleted, and that such sand, formation or stratum has a greater value or utility as a gas storage reservoir for the purpose of insuring an adequate supply of

natural gas for any particular class or group of consumers of natural gas, or for the conservation of natural gas, than for the production of the relatively small volumes of native gas which will remain therein, provided that no gas sand, formation or stratum shall be condemned under the terms of this Act[1] when the gas therein is being used for the secondary recovery of oil, unless gas in necessary and required amounts is furnished to the operator or operators of the secondary recovery operations for as long as oil is produced in paying quantities in the secondary operations for the recovery of oil at the same cost as that at which the gas was being produced at the time of condemnation by the operator of the secondary recovery project or projects.

(c) Only such area of such underground sand, formation or stratum as may reasonably be expected to be penetrated by gas displaced or injected into such underground gas storage reservoir may be appropriated hereunder.

(d) No rights or interest in existing underground gas reservoirs, being used for the injection, storage and withdrawal of natural gas, owned or operated by others than the condemner, shall be subject to appropriation hereunder.

The right of condemnation hereby granted shall be without prejudice to the rights of the owner of said lands or of other rights or interests therein to drill or bore through the underground stratum or formation so appropriated in such manner as shall comply with orders, rules and regulations of the commission issued for the purpose of protecting underground storage strata or formations against pollution and against the escape of natural gas therefrom and shall be without prejudice to the rights of the owner of said lands or other rights or interests therein as to all other uses thereof. The additional cost of complying with such regulations or orders in order to protect the storage shall be paid by the public utility.

Laws 1951, p. 135, § 3, eff. May 26, 1951.

(26) 2 Okl. Stats. 1971 Official Ed., p 3073 [52 Okl. St. Ann. § 1, p 34]

§ 36.4 Certificate of commission

Any natural gas public utility desiring to exercise the right of eminent domain as to any property for use for underground storage of natural gas shall, as a condition precedent to the filing of its petition in the district court, obtain from the commission a certificate setting out findings of said commission (a) that the underground stratum or formation sought to be acquired is suitable for the underground storage of natural gas and that its use for such purposes is in the public interest; (b) the amount of recoverable oil and native gas, if any, remaining therein; provided, that the commission shall issue no such certificate until after public hearing is had on application, pursuant to notice served in compliance with notice in civil actions in the district court, together with notice published at least once each week for two (2) successive weeks in some newspaper of general circulation in the county or counties where the gas is proposed to be stored, the first publication to be at least ten (10) days prior to the date of the hearing.
Laws 1951, p. 135, § 4, eff. May 26, 1951.

(27) 2 Okl. Stats. 1971 Official Ed., p 3074 [52 Okl. St. Ann. § 1, p 35]

§ 36.5 Petition to district court—Examination and determination—Subsequent proceedings

Any natural gas public utility having first obtained a certificate from the commission as hereinbefore provided, desiring to exercise the right of eminent domain for the purpose of acquiring property for the underground storage of natural gas shall do so in the manner hereinafter provided. Such natural gas public utility shall present to the district court of the county wherein the land is situated, or

to the judge thereof, a petition setting forth the purpose for which the said property is sought to be acquired, a description of the property sought to be appropriated and the names of the owners thereof as shown by the records of such county. The petitioner shall file the certificate of the commission as a part of its petition and no order by the court granting said petition shall be entered without such certificate being filed therewith. The court or the judge thereof shall examine said petition and determine whether the petitioner has the power of eminent domain and whether said property is necessary to its lawful purposes, and if found in the affirmative, such finding shall be entered in the record and subsequent proceedings shall follow the procedure now provided by law in the exercise of the rights of eminent domain by railroads.
Laws 1951, p. 136, § 5, eff. May 26, 1951.

(28) 2 Okl. Stats. 1971 Official Ed., p 3074 [52 Okl. St. Ann. § 1, p 36]

§ 36.6 Ownership of gas

All natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities, shall at all times be deemed the property of the injector, his heirs, successors or assigns; and in no event shall such gas be subject to the right of the owner of the surface of said lands or of any mineral interest therein, under which said gas storage fields, sands, reservoirs, and facilities lie, or of any person other than the injector, his heirs, successors and assigns, to produce, take, reduce to possession, waste, or otherwise interfere with or exercise any control thereover, provided that the injector, his heirs, successors and assigns, shall have no right to gas in any stratum, or portion thereof, which has not been condemned under the provisions of this Act,[1] or otherwise purchased.
Laws 1951, p. 136, § 6, eff. May 26, 1951.

(29) 2 Okl. Stats. 1971 Official Ed., p 3074 [52 Okl. St. Ann. § 1, p 37]

§ 36.7 Partial invalidity

If any section, paragraph, sentence or phrase of this Act[1] shall be declared unconstitutional or void for any reason by any court of final jurisdiction, such decision shall not, in any way, invalidate or affect any other section, paragraph, sentence or phrase of this Act, but the same shall continue in full force and effect.
Laws 1951, p. 136, § 7.

(30) 3 Okl. Stats. 1971 Official Ed., p 3517 [60 Okl. St. Ann. § 1, p 73]

60 O.S., ESTATES IN REAL PROPERTY

§ 64. Fee title covers what

The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.

66 Ok. St. RAILROADS

(31) 3 Okl. Stats. 1971 Official Ed., p 3986 [64 Okl. St. Ann. § 1, p 286]

§ 51 Power to enter upon and appropriate lands

Every railroad corporation incorporated under this Article,[1] and any railroad corporation authorized to construct, operate or maintain a railroad within this State, has power and is authorized to enter upon any land for the purpose of examining and surveying its railroad, and to take, hold and appropriate so much real estate as may be necessary for the location, construction and convenient use of its road, including all necessary grounds for buildings, stations, workshops, depots, machine-shops, switches, sidetracks, turntables, snow defences and water stations; all material for the construction of such road and its appurtenances, and the right of way over adjacent land sufficient to enable such corporation to construct and repair its road and the right to conduct water to its water stations, and to construct and maintain proper drains, and may obtain the right to such real estate by purchase or condemnation in the manner provided by the law. R.L. 1910, § 1397.

(32) 3 Okl. Stats. 1971 Official Ed., p 3986 [64 Okl. St. Ann. § 1, p 289]

§ 52. Purchasing or taking realty

Any railroad corporation may purchase and use real property for a price to be agreed upon with the owners thereof; or the damages to be paid by such corporation for any real property taken as aforesaid, when not agreed upon, shall be ascertained and determined as hereinafter provided. R.L. 1910, § 1399.

(33) 3 Okl. Stats. 1971 Official Ed., p 3986

§ 53. Taking by eminent domain—Commissioners—Appointment and proceedings—Right to construct road.—If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this state, may desire to locate its road, shall refuse to grant the right-of-way through and over his premises, the district judge of the county in which said real property may be situated shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, either by personal service or by leaving a copy thereof at his usual place of residence with some member of his family over fifteen (15) years of age, or, in case of his nonresidence in the state, by such publication in a newspaper as the judge may order, direct the sheriff of said county to summon three disinterested freeholders to be selected by said judge as commissioners, and who must not be

interested in a like question. The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of said railroad, and they shall assess the damages which said owner will sustain by such appropriation of his land, irrespective of any benefits from any improvement proposed, and they shall forthwith make report in writing to the clerk of the said court, setting forth the quantity, boundaries, and value of the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk, and a certified copy thereof may be transmitted to the register of deeds of the county where the land lies, to be by him filed and recorded (without further acknowledgment or proof) in the same manner and with like force and effect as is provided for the record of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises. R.L. 1910, § 1400; Laws 1971, c. 33, § 1. Operative Jan. 1, 1972.

(34) 3 Okl. Stats. 1971 Official Ed., p 3988 [64 Okl. St. Ann. § 1, p 312]

§ 54. Compensation, accrual of right to

When possession is taken of property condemned, as provided herein, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of said compensation. R.L. 1910, § 1401.

(35) 3 Okl. Stats. 1971 Official Ed., p 3988 [64 Okl. St. Ann. § 1, p. 51 pock. part]

§ 55. Review of commissioners' report—Jury trial—Notice

(A) The report of the commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisement on good cause shown; or either party may within sixty (60) days after the filing of such report file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, all costs in the district court may be taxed against him.

(B) Within ten (10) days after the report of commissioners is filed, the court clerk shall forward to the attorney of record for the condemnor, the attorney of record for each condemnee, and to all unrepresented condemnees, a copy of the commissioners' report and a notice stating the time limits for filing an exception or demand for jury trial as specified in paragraph (A) of this Section. This notice shall be on a form prepared by the Court Administrator, which shall be approved by the Supreme Court, and shall be distributed to all clerks of the district court by said Court Administrator. If a party has been served by publication, the clerk shall forward a copy of the report of commissioners and notice of time limits for filing an exception or demand for jury trial to the last known mailing address, if any, and shall cause a copy of the notice of time limits to be published in one (1) issue of a newspaper qualified to publish legal notices, as defined in 25 O.S. Supp. 1969, § 106. After issuing the notices provided herein, the court clerk

shall endorse on the notice form filed in the case, the date and that a copy of the report together with the notice was mailed to each party or his attorney of record, or the date the notice was published in compliance with the provisions hereof.

(C) The time limits for filing an exception and demand for jury trial, as prescribed in paragraph (A) of this Section, shall be calculated from the date the report of the commissioners is filed in the case. On failure of the court clerk to give notice within the time prescribed in paragraph (B) of this Section, the court, on application of any party, may extend the time for filing an exception to the report or a demand for trial by jury for a period not to exceed twenty (20) days from the date the application is heard.

R.L. 1910, § 1402; Laws 1961, p. 497, § 1; Laws 1970, c. 322, § 1, eff. Jan. 1, 1971.

APPENDIX "B"

(Orders in this case)

FILED
JULY 24, 1973
CHARLES N. HASKELL
Clerk, U. S. District Court
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, An Oklahoma corporation, Plaintiff,	)	
-vs-	)	Case No. 73-186 Civil
An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma,	)	
AND	)	
The United States of America as a matter affecting the title to certain Indian lands previously allotted in fee with certain restraints on alienation and presently restricted under the law as to the present owners of said lands,	)	
AND	)	
Elizabeth Star, Beaden Hope, Frances Wesley Wood, Yarner Tebe, Arthur Tebe, Poly Tebe, John Tebe, Charlie Tebe, Harry Carbitcher, Malinda Harjo,	)	

Sampson Harjo, Molly Mae Brown,)
Buster Brown, Josephine Brown,)
Wisey Mae Brown, Tootsie Brown,)
Agnes Lucas, Louis Hopia, Susie Lasley,)
Maxwell Darks, P. G. Parks,)
Marvin Olivo,)
Defendants.)

ORDER

On this 24th day of July, 1973 the Court on notice to all parties has heard and considered the Motion by Defendants Darks and Parks to Bring in Additional Defendants, the Motion of said Defendants for Temporary Restraining Order or Temporary Injunction to Prevent any Further Legal Action in State Court on the Subject Matter of this Case until Further Orders and Rulings are Made Herein, the Objections of said Defendants to any Finding that the Plaintiff has the Power of Eminent Domain and the request of Plaintiff that the Court determine and find that (1) Plaintiff has the power of eminent domain and (2) the property Plaintiff seeks to condemn is necessary to its lawful purposes both as required by Title 52 Oklahoma Statutes §36.5. All parties were represented by counsel. The Court received evidence and heard oral arguments.

The Court finds and concludes that the above-mentioned Motion to Bring in Additional Defendants should be denied. This Court has jurisdiction of this proceeding because the lands involved are restricted Indian lands. 25 United States Code §357; *Town of Okemah, Okl.* v. *United States*, 140 F. 2d 963 (Tenth Cir. 1944). There is no diversity of citizenship here. The additional defendants desired to be brought into this proceeding are defendants in State Court proceedings in which Plaintiff seeks to condemn certain of their property. These State Court defendants appear to be Oklahoma citizens and their lands appear not to be restricted Indian lands. This Court would not have jurisdiction of such condemnation proceedings for lack of diversity and the land not being restricted Indian lands. The State Court does have jurisdiction of said condemnation proceedings and this Court should not interfere with these State Court proceedings. For these reasons said Motion should be overruled.

The Court finds and concludes that the above-mentioned Motion of Defendants Darks and Parks for Temporary Restraining Order or Temporary Injunction et cetera should be denied.

28 United States Code §2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

No Act of Congress has been brought to the Court's attention or found by the Court which expressly authorizes an injunction of said State Court condemnation proceedings by this Court. The desired injunctive relief is not necessary in aid of this Court's jurisdiction as to this proceeding before it. This Court has jurisdiction of this proceeding as previously shown. As no judgment has been entered herein such desired injunctive relief is not necessary to protect or effectuate a judgment of this Court at this time or is this foreseen for the future. For these reasons said Motion should be overruled.

As the Objection of Defendants Darks and Parks to any Finding of the Court that the Plaintiff has the Power of Eminent Domain is completely related to the aforementioned request of Plaintiff made to the Court, the same will be considered together.

The property Plaintiff seeks to condemn herein is land necessary to acquire an underground storage area for natural gas. The complaint is filed pursuant to 52 Oklahoma Statutes §36.5.

52 Oklahoma Statutes §36.1 provides:

"As used in this Act (a) 'underground storage' shall mean storage in a subsurface stratum or formation of the earth; (b) 'natural gas' shall mean gas either while in its original state or after the same has been processed by removal therefrom of component parts not essential to its use for light and fuel; (c) 'native gas' shall mean gas which has not been previously withdrawn from the earth; (d) 'natural gas public utility' shall mean any person, firm or corporation authorized to do business in this State and engaged in the business of transporting or distributing natural gas by means of pipe lines into, within or through this State for ultimate public use; (e) 'commission' shall mean the State Corporation Commission."

52 Oklahoma Statutes §36.3 provides:

"Any natural gas public utility may condemn for its use for the underground storage of natural gas any subsurface stratum or formation in any land which the commission shall have found to be suitable and in the public interest for the underground storage of natural gas, and in connection therewith may condemn such other interests in property as may be required adequately to examine, prepare, maintain and operate such underground natural gas storage facilities; provided, however, that the right of condemnation of underground sands, formations and strata, granted hereby, shall be limited as follows:

(a) No sand, formation, or stratum which is producing or which is capable of producing oil in paying quantities, through any known recovery method, shall be subject to appropriation hereunder;

(b) No gas bearing sand, formation, or stratum shall be subject to appropriation hereunder, unless the volumes of native gas originally in place therein shall be

shown to be substantially depleted, and that such sand, formation or stratum has a greater value or utility as a gas storage reservoir for the purpose of insuring an adequate supply of natural gas for any particular class or group of consumers of natural gas, or for the conservation of natural gas, than for the production of the relatively small volumes of native gas which remains therein, provided that no gas sand, formation or stratum shall be condemned under the terms of this Act when the gas therein is being used for the secondary recovery of oil, unless gas in necessary and required amounts is furnished to the operator or operators of the secondary recovery operations for as long as oil is produced in paying quantities in the secondary operations for the recovery of oil at the same cost as that at which the gas was being produced at the time of condemnation by the operator of the secondary recovery project or projects.

(c) Only such area of such underground sand, formation or stratum as may reasonably be expected to be penetrated by gas displaced or injected into such underground gas storage reservoir may be appropriated hereunder.

(d) No rights or interest in existing underground gas reservoirs, being used for the injection, storage and withdrawal of natural gas, owned or operated by others than the condemnor, shall be subject to appropriation hereunder.

The right of condemnation hereby granted shall be without prejudice to the rights of the owner of said lands or of other rights or interests therein to drill or bore through the underground stratum or formation so appropriated in such manner as shall comply with orders, rules and regulations of the commission issued for the purpose of protecting underground storage strata or formations against the escape of natural gas there-

from and shall be without prejudice to the rights of the owner of said lands or other rights or interests therein as to all other uses thereof. The additional cost of complying with such regulations or orders in order to protect the storage shall be paid by the public utility. Laws 1951, p. 135, §3, eff. May 26, 1951."

As provided by 52 Oklahoma Statutes §36.5 the Certificate from the Oklahoma Corporation Commission required by 52 Oklahoma Statutes §36.4 has been attached to and filed with the Complaint herein. The Court has examined the same and it appears to fully comply with said Statute. It further appears to the Court from the evidence that the proceeding in which said Certificate was issued by the Oklahoma Corporation Commission has been finalized. As further required by 52 Oklahoma Statutes §36.5 it appears to the Court that Plaintiff's Complaint herein sets forth the purpose for which the property desired to be condemned herein is sought to be acquired, namely, as part of an underground storage area for natural gas; and also sets forth a description of the property sought and the names of the owners thereof as shown by the records of Hughes County, Oklahoma.

With further reference to 52 Oklahoma Statutes §36.5 and under the evidence presented to the Court it appears without question that Plaintiff is a natural gas public utility. Plaintiff is an Oklahoma corporation chartered for this precise purpose. It now functions and has functioned in the past as a natural gas public utility. There is no evidence before the Court which in any way negates the established fact that the Plaintiff has the power of eminent domain under Oklahoma law, 52 Oklahoma Statutes §36.3, *supra*. The Court therefore finds that the Plaintiff has the power of eminent domain as to this proceeding within the meaning of 52 Oklahoma Statutes §36.5.

With further reference to 52 Oklahoma Statutes §36.5 it further appears to the Court from the evidence before it

and the Court finds that the property sought to be condemned herein by Plaintiff is necessary for lawful purposes of the Plaintiff. The Plaintiff is in the business of transporting and distributing natural gas by means of pipelines within the state of Oklahoma for ultimate public use. It appears that Plaintiff is a wholly-owned subsidiary of Public Service Company of Oklahoma which is a public utility company engaged in providing electricity for ultimate public use and that much of Plaintiff's acquired natural gas is delivered to its parent company for use in the production of electricity. It further appears that Plaintiff is purchasing natural gas from producers and under many of its gas purchase contracts must either take an agreed amount of natural gas or pay for the same if not taken; that Plaintiff is paying approximately $250,000.00 per year to such producers for natural gas that it cannot handle and therefore cannot take due to having no storage area or need for the same; that there are peaks and valleys in calls on Plaintiff for natural gas and that with the underground storage area sought in these condemnation proceedings Plaintiff will have the capability of meeting all peak demands whereas without such capability Plaintiff will not be able to meet such peak demands; that with such underground storage area Plaintiff will have the system capability of having on hand gas for distribution as needed on a year-round, month-round and week-round level basis; that by having such underground storage capability Plaintiff will be able to receive natural gas and store the same which might otherwise be flared and forever lost for public use.

Under this evidentiary record the Court finds and concludes that the property sought to be condemned herein is necessary to its lawful purposes.

Defendants Darks and Parks have raised other Objections either by brief or verbally at the hearing conducting by the Court. The Court finds that none of these have any validity. It appears immaterial that Plaintiff may be engaging in the interstate transportation of natural gas even

though Plaintiff denies such activity and the evidence supports the Plaintiff in this regard. Under 52 Oklahoma Statutes §36.1 and §36.3 Plaintiff has the power of eminent domain whether it is engaged in the interstate or intrastate natural gas transportation and distribution business. Even if Plaintiff should be required to be licensed by the Federal Power Commission because engaged in interstate gas transportation it would still be necessary that Plaintiff condemn Oklahoma land under Oklahoma law. Said Defendants' complaints that the Oklahoma Corporation Commission proceeding is not final and that the Oklahoma Corporation Commission engaged in secret meetings is not supported by any evidence. Said Defendants desire to have the underground storage area subjected to the Oklahoma State Pooling Laws for the discovery and production of oil and gas is legally impermissible as said laws do not apply to this proceeding. Said Defendants desire to engage in competitive bidding for the property involved herein is likewise not material to these proceedings. Said Defendants wish not to be parties defendant in both the State and Federal Court condemnation proceeding is without merit as they apparently own both restricted and non-restricted lands in the whole area involved and therefore their interest must be litigated in both Courts. If the Court has overlooked any other objections said Defendants have made the same are without merit as determined at the time.

In view of the foregoing determination made by the Court. the Court fixes July 31. 1973 at 5:00 p.m. and the Courtroom of this Court in the Federal Building in Muskogee, Oklahoma, as the time and place for the appointment of commissioners as provided by law and directs that appropriate notice thereof be given.

It is so ordered this 24th day of July, 1973.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

FILED
SEP 10 1973
CHARLES N. HASKELL
Clerk, U. S. District Court
By .....
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma Corporation, Plaintiff,	)	
-vs-	)	Case No. 73-186 Civil
An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma,	)	
AND	)	
The United States of America, et al., Defendants.	)	

ORDER

Upon consideration of the Notice Of Election To Participate filed herein on July 30, 1973 by the Defendant Maxwell Darks, the Court finds that the requests contained in said Notice Of Election should be denied.

The Court has previously entertained a request of this Defendant to participate in the gas storage project involved herein as a part-owner and has denied the same as shown by the Order of the Court filed herein on July 30, 1973.

Neither at the July 24, 1973 hearing before this Court nor in the Motion under consideration has said Defendant cited any statute or case which would entitle him to par-

ticipate in the gas storage project involved herein as a part-owner thereof and thereby cause the requested dismissal of Plaintiff's condemnation proceeding brought herein pursuant to 52 Oklahoma Statutes §36.5. The Court is aware of no such statute or case which would entitle said Defendant to this requested relief.

It is so ordered this 10th day of September, 1973.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

FILED
SEP 10 1973
CHARLES N. HASKELL
Clerk, U. S. District Court
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma Corporation, Plaintiff,	)	
-vs-	)	Case No. 73-186 Civil
An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma,	)	
AND	)	
The United States of America, et al., Defendants.	)	

ORDER

The Court has considered the Objections To Plaintiff's Proposed Instructions filed herein on August 6, 1973 by the Defendant United States of America and finds said Objections to be valid. Accordingly, the Court has drafted Instructions To Commissioners which are deemed to be in keeping with the law and to satisfy the said Objections above mentioned even though not couched in the precise language of the Defendant United States of America.

The Court has also considered Proposed Instructions To The Commissioners filed herein by Defendant Maxwell Darks and has adopted such portions thereof as are deemed to be appropriate and valid in this particular condemnation case and has declined to adopt certain portions thereof deemed not proper in this particular condemnation case all as shown by the Instructions To Commissioners prepared herein by the Court.

It is so ordered this 10th day of September, 1973.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

FILED
SEP 10 1973
CHARLES N. HASKELL
Clerk, U. S. District Court
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma Corporation, Plaintiff,	)	
-vs-	)	Case No. 73-186 Civil
An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma,	)	
AND	)	
The United States of America, et al., Defendants.	)	

ORDER APPOINTING COMMISSIONERS

This cause coming on to be heard upon the Complaint and Application of the Plaintiff for an Order Appointing Commissioners in this cause.

And, it appearing from said Complaint and Order of this Court filed herein on July 30, 1973 that the Plaintiff is a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Oklahoma, and is a "natural gas public utility", and that the Plaintiff is authorized by the laws of the State of Oklahoma to exercise the right of eminent domain to acquire the right to use

the Channel Booch formation as found in the Adelman No. 1-B Well at the approximate depth of 2,496 feet to 2,556 feet, underlying the lands hereinafter described for the purpose of the underground storage of natural gas, and in connection therewith to take and appropriate by condemnation the right to use so much of the surface of the lands hereinafter described as may be necessary in connection therewith, for so long as the property is used for the storage of natural gas, which rights include, without limitation, the right to use, operate and maintain the presently existing wells presently owned by Plaintiff and described as:

Wesley No. 1	Southeast Quarter Sec. 30-8N-11E
Tebe No. 1	Northeast Quarter Sec. 36-8N-10E
Hope No. 1	West Half Northeast Quarter Sec. 28-8N-11E
Yargee No. 1	West Half Northeast Quarter Sec. 28-8N-11E
Byrd No. 1	West Half Southwest Quarter Sec. 22-8N-11E

and existing pipelines owned by Plaintiff and the further right to construct, operate, and maintain a 16-inch pipeline across the Southeast Quarter (SE¼) of Section 30, Township 8 North, Range 11 East, along the route shown more specifically upon the plat attached hereto and made a part hereof; and

It further appearing that the taking and use of the easement and rights herein described for the purpose of the underground storage of natural gas is a taking and use for a public purpose; and that this Court has jurisdiction of this cause by reason of the Act of Congress of March 3, 1901, Chapter 832, Sec. 3, 31 Stat. 1084, 25 USCA, Sec. 357, and that by reason of subdivision K, Rule 71A, the manner and method of determining compensation to which the Defendants will be entitled by reason of the taking and appropria-

tion of the easement and rights hereinafter described is governed by the laws of the State of Oklahoma relating to the manner and method of determining compensation in eminent domain cases; and

It further appearing that notice has been given in the manner provided by law of the presentation of the Plaintiff's Complaint and Application for Appointment of Commissioners;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Clyde Fuqua, Charles Moore and Binas Hostettler, disinterested freeholders and residents of Hughes County, Oklahoma in the Eastern Judicial District of Oklahoma, be and they are hereby appointed as Commissioners to inspect the real property hereinafter described and to consider and determine and assess just compensation which the Defendants are entitled to receive by reason of the taking and appropriation of the easement, existing wells and pipelines and other rights necessary for the underground storage of natural gas to the extent of such appropriation as set out in the Complaint as filed herein.

That the lands and interest therein upon and under which said Plaintiff seeks to take and appropriate the right to use and operate its underground gas storage facility are described on Exhibit A attached hereto, and in conjunction with such rights, Plaintiff will have the right and privilege of entering upon said lands for the purposes aforesaid including the right of ingress and egress at all times for said purposes.

That Plaintiff, will pay to Defendants, their successors in interest or tenants, as their respective interests may appear, all damages to growing crops, timber, fences and improvements, occasioned by the construction of pipelines, or other acts of Plaintiff in exercising the rights and privileges sought herein, which damages are not to be considered by you in determining the damages which said owners will

sustain by the appropriation of such rights by Plaintiff, except that with respect to Tract 5 the damages accruing to the owner of said tract by reason of the proposed construction of a 16-inch pipeline thereon below plow depth should be determined at this time.

It is further ordered that the said Commissioners be, and they are hereby directed forthwith to take and subscribe to the Oath required by law and to view and inspect the said lands herein described and conduct such inquiry and investigation as you deem reasonable and necessary and determine just compensation to Defendants and complete and sign your Report of Commissioners and file same with the Clerk of this Court.

It is further ordered that the Clerk of this Court transmit copies of this Order to each of the Commissioners by letter, which shall instruct them to make and sign the required Oath before a Notary Public of the State of Oklahoma, and thereafter, to view and inspect the property herein described and to file their Report of Commissioners which Oath and form of Report of Commissioners shall be transmitted by the Clerk to one of the Commissioners selected by him at the same time a copy of this Order is transmitted to such Commissioners.

Dated this 10th day of September, 1973.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

EXHIBIT A

TRACT 1:

The East Half of the Southeast Quarter ($E\frac{1}{2}SE\frac{1}{4}$) of Section 21, Township 8 North, Range 11 East, Hughes County, Oklahoma, containing 80 acres, more or less, allotted to Annie Harjo, Creek 6575, deceased.

The right to continue to use, maintain, and operate the existing pipelines owned by Plaintiff and located upon the above-described land together with the right to use and operate its gas storage facility with all rights necessary thereto as set out in the Complaint herein.

OWNERS:

Surface:

Agnes Lucas
Maxwell Darks
As their interests may appear in a total ownership of 80 surface acres.

Mineral:

Agnes Lucas
Louis Hopia
Susie Lasley
As their interests may appear in a total ownership of 80 mineral acres.

TRACT 2:

The West Half of the Southwest Quarter (W½SW¼) of Section 22, Township 8 North, Range 11 East, Hughes County, Oklahoma, containing 80 acres, more or less, allotted to Annie Harjo, Creek 6575, deceased.

The right to continue to use, operate, and maintain the existing well from the surface to the base of the Channel Booch formation together with the equipment appurtenant thereto, presently owned by Plaintiff, and located upon the above-described land, and the right to continue to use, operate, and maintain the existing pipelines presently owned by Plaintiff and located upon the above described land, together with the right to use and operate a gas storage facility and all rights necessary thereto as set out in the Complaint herein.

OWNERS:

Surface:

Maxwell Darks
As his interest may appear in a total ownership of 80 surface acres.

Mineral:

Agnes Lucas
Louis Hopia
Susie Lasley
As their interests may appear in a total ownership of 80 mineral acres.

* * * * * *

[Tracts 1 and 2 illustrate Exhibit A, remainder omitted for purpose of brevity]

FILED
OCT. 31, 1973
CHARLES N. HASKELL
Clerk, U. S. District Court
By .....
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMANY, An Oklahoma corporation, Plaintiff,	)	
-vs-	)	Case No. 73-186 Civil
An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located	)	

upon, over and under certain tracts of land in Hughes County, Oklahoma.

AND

The United States of America, et al.,

Defendants.

ORDER

By Objection And Motion filed herein by the above Plaintiff, the Court is advised that the Defendant Maxwell Darks, through his attorney, Carl Michael Smith, has taken steps to take on November 2, 1973 the depositions of C. A. Moore, Binas Hostettler and Clyde Fuqua, the appraisers-commissioners appointed herein by the Court.

Pursuant to authority vested in the Court by Rule 26c, Federal Rules of Civil Procedure (the above Objection and Motion is considered and treated as being filed hereunder) it is ordered that said depositions not be taken. Accordingly, Defendant Maxwell Darks and his attorney, Carl Michael Smith, are directed not to proceed further with the taking of said depositions or any other depositions of said appraisers-commissioners appointed herein by the Court without the prior approval of the Court.

This Order is based on what the Court under the circumstances of this case would consider as annoyance, embarrassment, oppression and undue burden and expense on said appraisers-commissioners.

Leave is granted the Defendant Maxwell Darks, if he desires, to make written application herein for authority from the Court to take the depositions of said appraisers-commissioners. Said application will be supported by a brief containing authorities permitting these depositions to be

taken in this case and detailed reasons why said Defendant desires to take said depositions.

It is so ordered this 31 day of October, 1973.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

FILED
NOV. 16, 1973
CHARLES N. HASKELL
Clerk, U. S. District Court
By .....
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma Corporation,

Plaintiff,

-vs-

Case No. 73-186 Civil

An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma,

AND

The United States of America, et al.,

Defendants.

ORDER

Upon consideration of the Exception To Commissioners Report filed herein by the Defendants Maxwell Darks and P. G. Parks, the Court finds that the same should be overruled and the Report Of Commissioners filed herein on October 1, 1973 should be confirmed.

The Court has previously ruled adversely to the above Defendants on many of said exceptions and need not rule again on the same. The other exceptions are deemed to be without merit. The Commissioners were qualified to act as such and followed the Court's instructions. The Court will conduct no hearing on said Report Of Commissioners. The Oklahoma condemnation procedure is not unconstitutional but affords due process of law and the equal protection of the laws in all respects.

It is so ordered this 16th day of November, 1973.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

FILED
MAY 2, 1974
CHARLES N. HASKELL
Clerk, U. S. District Court
By .....
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPELINE COMPANY, an Oklahoma corporation, Plaintiff, -vs- AN EASEMENT, ETC., HUGHES COUNTY, OKLAHOMA, U. S. A., MAXWELL DARKS, et al., Defendants.	)	Case No. 73-186 Civil

ORDER

Upon consideration of the Motion of Defendant Maxwell Darks filed herein on March 1, 1974 that the Court dismiss this condemnation action with prejudice and issue a permanent injunction and Brief in support thereof, Plaintiff's Response and Brief thereto, Plaintiff's Memorandum of Interest filed herein on March 5, 1974 and after conducting a hearing on said Motion, the Court finds that said Motion should be denied in its entirety.

Defendant Darks' first complaint is that Plaintiff entered upon the premises before the Report of Commissioners was filed herein. The Court declined to receive evidence on this complaint on the basis that if the same is true, which Plaintiff denies, the relief desired of dismissal of this action or a permanent injunction against Plaintiff from making further entry is inappropriate as a matter of law. Plaintiff's

remedy of trespass is adequate and bars injunctive relief. As Plaintiff has the power of eminent domain and the Commissioners' Report has been filed herein and the compensation found has been paid into the Registry of the Court, the action should not be dismissed.

Defendant Darks' next complaint about the Commissioners not being furnished the quantity and the boundaries of the property taken is wholly without merit as shown by the Court's Instructions to the Commissioners on file herein and by reference made a part hereof. The tracts involved were appropriately described to the Commissioners as to quantity and boundaries.

Defendant Darks' next complaint that Plaintiff made an improper deposit of just compensation as found by the Commissioners is not supported by the record. Plaintiff deposited the total compensation found by the Commissioners the same day the Report was filed. When Darks finally demanded his compensation the Clerk advised him how to ascertain the amount he was entitled to receive. Darks did not heed this advice. But the Court caused the information to be filed herein and then mailed Darks a check for his just compensation which he refused to accept and returned to the Clerk. It is patently obvious that Darks is not honest and sincere in this complaint. Just compensation due him was deposited. His portion thereof in due course was ascertained, the same was forwarded to him by check and as stated above he has refused to accept the same.

Defendant Darks' next assertion that Plaintiff has abandoned this lawsuit and is a trespasser is denied by Plaintiff and is not supported by the record in this case. This assertion is deemed wholly without merit.

Defendant Darks' complaint that the notice of the Commissioners' Report did not conform to Oklahoma requirements is without validity as Defendant Darks timely objected to the Report which is the purpose of the Notice

as far as Darks is concerned. This technical complaint is without merit as Defendant Darks received substantial notice of the Commissioners' Report and took the only action open to him thereon and did so in time.

Defendant Darks' last complaint that one of the Commissioners was an attorney and by reason of such fact was not eligible to be a Commissioner because Commissioners are to be picked from the regular jury list and said Commissioner being an attorney was not qualified to serve as a juror is without merit. Assuming, without deciding, that Defendant Darks' position about said Commissioner is correct he has objected to the Report of Commissioners and has demanded a jury trial and has failed to show any prejudice with reference to said Commissioners' activities. There are two phases to this condemnation procedure under Oklahoma law. The first is the appraiser-commissioner phase. The second phase comes into play in the event a party is dissatisfied with the appraiser-commissioner report and objects thereto and demands a jury trial. In the second phase, the matter of just compensation is then conducted in the same manner as other civil actions. 66 Oklahoma Statutes 55(A). This latter proceeding is in the nature of a trial de novo and the amount of the appraiser-commissioner award is not competent evidence. *Wichita Falls & N. W. R. Y. Co.* v. *Munsell*, 132 P. 906 (Okla. 1913); *Arkansas Louisiana Gas Company* v. *Maggi*, 409 P. 369 (Okla. 1965).

In the case last cited above it was stated:

> ". . . Assuming but not deciding that Humphrey was technically disqualified to serve as an appraisement commissioner the next question to determine is the effect of his disqualification on the validity of the present proceedings. Both parties demanded a jury and the amount of damages was fixed by a jury. Quite properly the jury was not informed of the amount awarded by the commissioner.

* * * * * *

"The Plaintiff in the present case, demanded a jury trial and proceeded with a jury trial after his exceptions to the commissioners report had been overruled. There is no evidence that plaintiff was prejudiced by the irregularity, if any, connected with the appointment and report of the commissioners and the trial court committed no error in this matter."

Defendant Darks has demanded and will receive his de novo proceeding before a jury to determine just compensation. He has shown no prejudice from the alleged irregularity and no purpose will be served by repeating the appraiser-commissioner phase much less granting the relief sought in connection with this complaint, namely, dismissal and permanent injunction.

Accordingly, said Motion of Defendant Darks is overruled in its entirety this 2nd day of May, 1974.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

FILED
JULY 19, 1974
CHARLES N. HASKELL
Clerk, U. S. District Court
By .....
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma Corporation,	)	
Plaintiff,	)	
-vs-	)	No. 73-186-C
An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma,	)	
AND	)	
The United States of America, et al.,	)	
Defendants.	)	

ORDER

Defendant Darks has responded to plaintiff's motion and brief pursuant to the Order of June 20, 1974, granting temporary protection from discovery. The response states that the sole purpose of taking plaintiff's deposition is to discover whether or not the plaintiff is in fact operating within interstate commerce and subject to regulation by the Federal Power Commission.

This question has been ruled adversely to defendant Darks in the Order dated July 24, 1973, filed July 30, 1973, in which Judge Daugherty held that it is immaterial that plaintiff may be engaging in the interstate transportation of natural gas. Judge Daugherty pointed out that under Oklahoma law plaintiff has the power of eminent domain whether it is engaged in the interstate or intrastate natural gas transportation and distribution business; that even if plaintiff should be required to be licensed by the Federal Power Commission it would still be necessary that plaintiff condemn land under Oklahoma law. (Order, p. 6, File No. 1).

The only issue in this case is the amount of damages due the defendants for the taking. The stated purpose of the discovery is not germane to the issue. The plaintiff's motion for a protective order against the proposed deposition set out in Notice of Deposition filed June 14, 1974, should be sustained.

IT IS SO ORDERED THIS 19th day of July, 1974.

s/ Joseph W. Morris
United States District Judge

FILED
AUG. 26, 1974
CHARLES N. HASKELL
Clerk, U. S. District Court
By .....
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma corporation, Plaintiff,	)	
An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma,	)	NO. 73-186-C
AND	)	
The United States of America, Defendants.	)	

THIRD PRETRIAL ORDER

This matter came on for third pretrial conference August 26, 1974.

The nature of the case and jurisdiction are as set out in the first Pretrial Order herein.

Pursuant to above Pretrial Order, the owners of the surface of Tract No. 1 as determined to be in the Defendant Maxwell Darks as to an undivided ½ interest and in Agnes Lucas now Wesley as to an ½ undivided interest.

Discussion was had as to the measure of damages for the mineral ownership, Plaintiff alleging same to be equal to the royalty value of the economically recoverable gas

remaining in the Channel Booch formation at the date of taking and defendants contending for a measure of damage equal to the value of all gas so remaining. The United States of America was directed to submit by September 9, 1974, a Brief supporting its view of the measure of damage with respect to the mineral owners if it was desired to assert seriously a claim for damage based upon the value of 100% of gas remaining. If such Brief is submitted, Plaintiff will have 10 days within which to file reply Brief.

With respect to surface damage, all parties have heretofore submitted Briefs and oral argument will be heard as to the measure of damage recoverable by surface owners September 24, 1974 at 1:30 p.m.

Defendant Darks was ordered not to present at trial any allegations concerning alleged trespass or damage resulting therefrom. If any cause of action for such trespass may exist same shall not be prejudiced by this Order.

The number of witnesses to be allowed the parties at trial will be decided after oral argument has been heard and a decision made with respect to the measure of damage.

Plaintiff appeared by Andrew Wilcoxen and Charles B. Crane, Defendant Marvin Olivo appeared by George W. Oliphant, Defendant Maxwell Darks appeared by Carl Michael Smith, Defendant The United States of America appeared by Robert D. McDonald, Assistant United States Attorney.

s/ Joseph W. Morris
United States District Judge

APPROVED:

Charles B. Crane

Andrew Wilcoxen

s/ Edwin L. Gage
Edwin L. Gage

Carl Michael Smith

s/ George W. Oliphant
George W. Oliphant

FILED
SEPT. 5, 1974
CHARLES N. HASKELL
Clerk, U. S. District Court
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma corporation, Plaintiff,	)	
-vs-	)	No. 73-186-C
An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma,	)	
AND	)	
THE UNITED STATES OF AMERICA, et al., Defendants.	)	

ORDER

On August 21, 1974, the defendant Maxwell Darks served Interrogatories on the plaintiff, to which the plaintiff has duly and timely filed objections.

After reviewing the interrogatories and objections the Court is of the opinion that the interrogatories are irrelevant and neither prove nor disprove the remaining issue in this lawsuit, which is the measure of damages sustained by the defendants.

The objection of the plaintiff to the interrogatories submitted by the defendant Maxwell Darks is sustained.

IT IS SO ORDERED this 5th day of September, 1974.

s/ Joseph W. Morris
United States District Judge

FILED
DEC. 31, 1974
CHARLES N. HASKELL
Clerk, U. S. District Court
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma corporation,	)	
Plaintiff,	)	
-vs-	)	No. 73-186-C
An easement for the preparation, use and operation of a gas storage facility to be located upon, over and under certain tracts of land in Hughes County, Oklahoma,	)	

and	)	
THE UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

ORDER

In this case plaintiff is exercising the right of eminent domain for the purposes of acquiring an easement for the underground storage of natural gas in the Channel Booch Formation with respect to 7 tracts of land fully described in the complaint. In connection with the underground gas storage area the plaintiff is also acquiring the right to continue using 5 existing Channel Booch wells and pipe lines and the surface of the described lands together with equipment located thereon to the extent necessary to operate the storage project. An existing Channel Booch well is located on each of tracts 2, 3, 4, 5 and 6. Plaintiff is also acquiring by eminent domain the right to construct and operate a 16 inch pipe line upon and across Tract 5. The commissioners appointed by the Court have determined the damages to which each defendant is entitled, distribution to each defendant pursuant to court order has been made and title to the property interests taken is now vested in plaintiff. *Oklahoma Turnpike Authority* v. *Dye*, 256 P.2d 438 (Okla. 1953). Each defendant has requested a jury trial on the question of damages and this case will be tried to a jury pursuant to the procedure as specified in the Honorable Fred Daugherty's pre-trial order of January 10, 1974. The sole remaining legal issue is: What is the proper measure of damages?

A third pre-trial conference was held on August 26, 1974, at which time the parties were directed to submit briefs supporting their respective views with respect to

the proper measure of damages. Briefs were submitted and the Court thereafter requested oral argument, at the conclusion of which the matter was taken under advisement.

By the authority of 52 O.S. §36.1 et seq, the plaintiff has acquired or is acquiring an easement for the underground storage of natural gas in the Channel Booch formation in and under approximately 3650 acres of land described in the complaint. The above described land lies in a northeasterly/southwesterly direction, is approximately 4½ miles long and approximately one mile wide. In this case only 7 tracts are involved, totaling approximately 720 acres. The 7 tracts of land are comprised of five (5) tracts of approximately 80 acres each and two (2) tracts of approximately 160 acres each. In certain of the tracts the defendants own the fee simple absolute. In other tracts there has been a legal severance of the oil, gas and other minerals so that with respect to those tracts the title to the minerals is in certain defendants with the title to the remaining part of the fee simple, commonly referred to as the "surface," being in other defendants.

The plaintiff is acquiring an easement for underground gas storage purposes in but one formation known as the Channel Booch formation or sand. In the Adelman #1-B well located in the center of the NW/4 NW/4 of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, the top of that formation is at approximately 2496 feet and the base of that formation is at approximately 2556 feet. The Channel Booch formation is a dry gas formation and was once productive of natural gas but the Oklahoma Corporation Commission has found that this reservoir is ideally suited for the underground storage of natural gas and that this use of the reservoir is of greater value or utility for both plaintiff's consumers and for conservation of natural gas than the production of the relatively small volumes of native gas which remain in that formation. The owners of the surface of the 7 tracts of land involved in this

case can continue to use their land for their own purposes, subject only to the right of the plaintiff to enter upon the land if and when necessary in the operation of the gas storage reservoir. The mineral owners or their lessees have the legal right to drill wells to shallower or deeper depths than the Channel Booch sand, notwithstanding the taking by the plaintiff and the plaintiff is required to pay any additional costs which may be incurred in order to protect the Channel Booch formation if and when the mineral owners or their lessees drill through it. 52 O.S. §36.3(d). Plaintiff is also obligated to pay to the surface defendants or their successors in interest or tenants as their respective interests may appear, all damages to growing crops, timber, fences and improvements occasioned by the future construction of pipe lines, the drilling of wells or other acts of the plaintiff in exercising the rights which plaintiff has acquired by by virtue of condemnation, with the exception that with respect to Tract 5 the damages accruing to the owner of that tract by reason of the proposed construction of the 16 inch pipe line will be determined by the jury when this case is tried.

THE SURFACE OWNERS

The parties have wide differences of opinion concerning the proper measure of damages. The plaintiffs argue that the usual measure of damages is applicable in this case and that it is as follows: The difference between the market value of the land immediately before and immediately after the taking. The defendant surface owners all argue *in effect* that the proper measure of damages is to be determined as follows: Determine the value of the use of the Channel Booch sand to the plaintiff as a public utility for gas storage purposes in and under all of the land where the Channel Booch reservoir is found, namely 3650 acres. Defendants then argue that whatever that value is determined to be, each defendant is entitled to that percentage of the whole which the number of acres in his tract bears to the total

number of acres. Although defendants profess recognition of the well recognized rule that damages are to be determined on the basis of the value of what the defendant has lost and not what the condemnor has gained, their argument, as the Court views it, really is that they are entitled to damages equal to a fraction or percentage of the total value to the plaintiff of the entire underground storage reservoir. The law is to the contrary. In 4 Nichols on Eminent Domain §12.21 the author states:

> "The just compensation to which an owner is entitled when his property is taken by eminent domain is regarded in law from the point of view of the owner and not the condemnor. In other words, just compensation in the constitutional sense is what the owner has lost, not what the condemnor has gained. The fact that the particular parcel is required for purposes of the condemnor does not, ordinarily, add to the value thereof."

The Court concludes that the proper measure of damages with respect to the surface owners is to be determined by ascertaining the difference between the market value of each tract of land immediately before and immediately after it is burdened by the easement and related uses in question. As the Supreme Court of Oklahoma stated in *Durell* v. *Public Service Company of Oklahoma*, 51 P.2d 517 at 519 (1935):

> "The true measure of damage was the difference, caused by the high line and its contemplated use and maintenance, between the market value of the land immediately before and immediately after the placement of the high line."

The same test is laid down in 4 Nichols on Eminent Domain §12.41[2] where the author states:

> "The measure of damages is normally the difference in the market value of the land free of the easement

> and the market value as burdened with the easement which has been imposed."

Some of the defendants argue that the nature of the estate taken is not an easement but rather is a defeasible fee. It is clear from the complaint that the estate which the plaintiff seeks to condemn is an easement only and the mere fact that the plaintiff may be authorized under the statute to take a greater estate does not mean that the plaintiff has taken a fee simple defeasible when the complaint and all the proceedings thereafter make it quite clear that only an easement is taken. *Chicago, Rock Island and Pacific Railroad Company* v. *Morgan*, 421 P.2d 268 (Okla. 1966).

Some of the defendants also argue that the nature of the interest taken cannot be an easement because it does not come within the statutory definition of an easement as found in Title 60 O.S. §49. Clearly the easement being taken by plaintiff does not run afoul of that section, which expressly defines as easements a number of burdens and servitudes which are as great, if not greater, than the burden being imposed by the present taking. Indeed one of the burdens expressly recognized as an easement in both Title 60 O.S. §49 and Title 60 O.S. §50 is "the right of taking water, wood, *minerals*, and other things." (Emphasis added.)

Perhaps the closest analogy that can be made with respect to the nature of the property interest being taken by plaintiff in the Channel Booch sand is the property interest which an oil and gas lessee acquires upon the execution of an oil and gas lease. An oil and gas lessee's interest in Oklahoma is a non-possessory, incorporeal interest. Such interest was recently described by the Oklahoma Supreme Court in *DeMik* v. *Cargill*, 485 P.2d 229 (1971) at 233 as follows:

> "The right, or interest, acquired in a lessor's land by lessee, has been denominated a qualified right to enter upon the premises:

'. . . to erect structures on the surface of their land, and explore therefor by drilling wells through the underlying strata, and to take therefrom and reduce to possession, and thus acquire absolute title as personal property to such as might be found and obtained thereby . . . The right so granted or reserved, and held separate and apart from the possession of the land itself, is an incorporeal hereditament; or more specifically, as designated in the ancient French, a profit a prendre, analogous to a profit to hunt and fish on the land of another. . . . Rich v. Doneghey, 71 Okl. 204, 177 P. 86, 3 A.L.R. 352.' "

In some respects the property interest acquired by the plaintiff is an interest of lesser stature than the property interest acquired by the normal oil and gas lessee. This is so because plaintiff's interest here is strictly limited to the use of one sand, namely the Channel Booch formation. Further plaintiff can only use this sand for gas storage purposes. Plaintiff cannot explore for or produce gas from other sands. And with respect to any remaining economically recoverable native gas remaining in the Channel Booch sand, plaintiff is obligated to pay just compensation to the mineral owners. In another respect, however, plaintiff has a greater interest than a normal oil and gas lessee in that unlike an ordinary oil and gas lessee whose lease is subject to drainage, gas which is injected into the reservoir acquired by plaintiff for gas storage purposes is *owned* by the plaintiff and may not be produced or taken or reduced to possession by anyone else. 52 O.S. §36.6. Thus, although the analogy is not perfect, it is the Court's view that the nature of the interest taken by the plaintiff in this proceeding is clearly incorporeal and may properly be classified as an easement for the purposes of determining damages.

In *Peoples Gas Light and Coke Company* v. *Buckles*, 182 N.E.2d 169 (Ill. S. Ct. 1962), a case which involves condemnation of an underground gas reservoir for the storage of natural gas pursuant to the Illinois statute, the Court

described the nature of the taking and the measure of damages as follows:

"To understand the problem we must initially determine the nature of the taking. Plaintiff's petition sought, and the judgment of the court gave the plaintiff the right, privilege and easement to introduce gas into the St. Peter geological strata and to store gas in such formation with the right to remove such gas with any water vapors absorbed. No taking of the fee . . . is involved. Plaintiff's taking amounts to no more than an easement, and the usual measure of damages payable to such cases is based upon the diminution of the fair cash market value of the property burdened by the easement."

A more recent decision by the Supreme Court of Illinois applying the same test is *Midwestern Gas Transmission Company* v. *Madison*, 201 N.E.2d 379 (1964).

The Court accordingly concludes that the principle laid down by the Oklahoma Supreme Court in *Durell* v. *Public Service Co., supra,* and also applied by the Illinois Supreme Court is the proper principle and is applicable in determining just compensation to the surface owners of the various tracts in the present case. This will not preclude consideration of the highest and best use in arriving at market value of each tract immediately before and immediately after it is burdened by the easement, provided such use is reasonable under the circumstances.

THE MINERAL OWNERS

The plaintiff contends that at the date of taking in this case it was the owner of valid and subsisting oil and gas leases on each of the tracts in which plaintiff is seeking condemnation. The United States of America and other defendants refute this argument and contend that the plaintiff's oil and gas leases were not in full force and effect and contend that they are entitled to 8/8ths of the recoverable reserves of gas in the Channel Booch formation in and under

each of the respective tracts in which the defendants own mineral interests.

It is the Court's view that if the plaintiff owned valid and subsisting oil and gas leases on the tracts of land in question at the time of the taking, then the defendant mineral interest owners are only entitled to the value of 1/8th of the economically recoverable gas reserves in the Channel Booch formation in and under each tract. If there is a genuine issue of fact concerning whether or not plaintiff's oil and gas leases were valid and subsisting with respect to any or all of these tracts, it may be necessary to hold an evidentiary hearing to determine this question.

The Court recognizes that it is arguable that the mineral interest owners and not the surface owners are entitled to just compensation with respect to the use of the underground gas reservoir. The Court is of the opinion, however, that it would be improper application of law in this kind of a case, where a determination has already been made by the Oklahoma Corporation Commission with respect to the Channel Booch formation, that "the volumes of native gas originally in place are substantially depleted" to conclude that the mineral interest owners and not the surface owners are entitled to just compensation for the use of the pore space in the rocks which constitute the Channel Booch formation. Furthermore, the public policy of the State of Oklahoma, as set forth in 52 O.S. §36.6, specifically precludes exploration and production by any mineral interest owner in the Channel Booch formation and forbids him from producing or taking or reducing to possession any gas contained in this formation. See also *Emeny* v. *The United States*, 412 F.2d 1319 (Ct. of Claims 1969); *Tate* v. *United Fuel Gas Co.*, 71 S.E.2d 65 (W. Va. 1952); *Miles* v. *Home Gas Co.*, 316 N.Y.2d 908 (3rd Dept. 1970).

IT IS SO ORDERED this 31st day of December, 1974.

s/ Joseph W. Morris
United States District Judge

FILED
APRIL 9, 1975
CHARLES N. HASKELL
Clerk, U. S. District Court
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma corporation, Plaintiff,	)	
vs.	)	No. 73-186-C
An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma, AND The United States of America, et al., Defendants.	)	

FOURTH PRETRIAL ORDER

This matter came on for fourth pretrial conference March 4, 1975.

The nature of the case and jurisdiction are as set out in the first Pretrial Order herein.

The date of taking with respect to the mineral interest involved is established as October 1, 1973.

With respect to the surface interest, Defendant Darks contends that the date of taking was March 12, 1974, the date of Order of Distribution filed herein; Plaintiff's position is that the date of taking for all purposes was October 1, 1973, the date Plaintiff deposited with the court clerk the amount of the Commissioners awards.

Two expert witnesses will be allowed each side in each tract in which both surface and mineral interests are involved. In tracts in which only surface interest or only mineral interest are involved, each side will be allowed one expert witness.

Defendant, The United States of America, asserted the position that five Oil and Gas Leases on lands covered by this case terminated with the date of last production which assertedly was prior to the date of taking. Plaintiff's contention is that all such Oil and Gas Leases were valid and subsisting until at least the date of taking.

In view of the foregoing, trial of this cause previously set for March 27, 1975 was stricken and an evidentiary hearing to determine the validity of the Oil and Gas Leases at the date of taking was set for 9:30 a.m., April 9, 1975.

The United States of America was instructed to furnish to Plaintiff and to the Court copies of the Oil and Gas Leases pertinent.

Plaintiff appeared by Andrew Wilcoxen and Charles B. Crane, Defendants Marvin Olivo and T. G. Parks appeared by George W. Oliphant, Defendant Maxwell Darks appeared by Carl Michael Smith and personally, Defendant The United States of America appeared by Edwin L. Gage, Assistant United States Attorney.

s/ Joseph W. Morris
United States District Judge

APPROVED:

Charles B. Crane

Andrew Wilcoxen

s/ Edwin L. Gage
Edwin L. Gage

Carl Michael Smith

George W. Oliphant

FILED
AUG. 1, 1975
By .....
CHARLES N. HASKELL
Clerk, U. S. District Court
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma corporation, Plaintiff,	)	
-vs-	)	No. 73-186-C
An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma	)	
AND	)	
The United States of America, et al., Defendants.	)	

ORDER DENYING MOTION TO DISMISS

The defendant Maxwell Darks has filed herein a motion to dismiss for lack of jurisdiction. In support of his motion Darks states several grounds: (1) that 25 U.S.C. §357 does not apply to this defendant since he is less than ½ Indian blood; (2) that defendant Darks does not own restricted Indian land, and (3) that the subject land may only be acquired by purchase under 61 Stat. §732, 25 U.S.C. §§396, 396(g) and 25 C.F.R. §§1713A, 172.4, 172.4a. Darks raises several other points which do not relate to Darks but rather relate only to other defendants. The defendant Darks does not have standing to raise issues as to other defendants and such issues will not be considered.

The Honorable Fred Daugherty has previously determinated in this case that "[t]his Court has jurisdiction of this proceeding because the lands involved are restricted Indian lands." Both of the tracts in which defendant Darks owns an interest are as to some segment of ownership restricted Indian lands. The mineral interests in both tracts 1 and 2 are owned by restricted Indians, and an undivided ½ interest in the surface of tract 1 is owned by Agnes Lucas, a restricted Indian. Defendant Darks owns an undivided ½ interest in the surface of tract 1 and all of the surface of tract 2.

25 U.S.C. §357, upon which jurisdiction herein is claimed, provides:

> "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

Jurisdiction under this section has been held to be exclusively in federal courts. *Town of Okemah, Okla.* v. *United States, et al.*, 140 F.2d 963 (10th Cir. 1944).

The defendant Darks contends in effect that the joinder of him as a defendant involves the joinder of a separate subject matter over which the Court has no jurisdiction under 25 U.S.C. §357. Section 357 provides for condemnation of lands allotted to Indians "in the same manner as land owned in fee. . . ." Certainly in an ordinary condemnation action the condemnor would be expected to join all parties who claim an interest in the property in question. The defendant Darks would apparently read section 357 to limit the defendants in a condemnation action under this section to only restricted Indians. Under this construction a condemnor seeking to condemn land owned partially by restricted Indians and partially by others would be forced to bring the action in two different courts, the action against restricted Indians being required to be brought in federal court and the action against others being brought in state court.

The narrow construction of section 357 urged by defendant Darks is not required by the language of the statute and the Court concludes that to so construe it would be erroneous. There is no question but that the land in question was originally "allotted in severalty to Indians." A segment of ownership of said land is now owned by Indians. That is to say, all of the minerals in both tracts 1 and 2 are owned by Indians and ½ of the surface in tract 1 is owned by an Indian. In such circumstances a reasonable and proper construction of the statute is that all segments of ownership which combined together to make up the fee simple absolute in tracts 1 and 2 are embraced within the language of §357. Each person who holds a segment of such ownership is subject to federal court jurisdiction.

However, even if the surface of the land owned by Darks is considered as a separate subject matter for purposes of jurisdiction under 25 U.S.C. §357, this Court has jurisdiction over the condemnation of such land under the doctrine of pendent jurisdiction. The basis for such jurisdiction has been clearly defined by the United States

Supreme Court in the case of *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966) in which a state claim was allowed to be joined with a federal claim where the state and federal claims were derived from "a common nucleus of operative fact." The Court held that "if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole."

The Courts of Appeals for several circuits have held that pendent jurisdiction applies to state claims against defendants not named in the federal claim. See *Leather's Best, Inc.* v. *S. S. Mormaclynx*, 451 F.2d 800 (2nd Cir. 1971); *Shulman* v. *Huck Finn, Inc.*, 472 F.2d 864 (8th Cir. 1973); *Curtis* v. *Everette et al.*, 489 F.2d 516 (3rd Cir. 1973), *cert. den.* 416 U.S. 995 (1974). This Court recognizes that the power to hear state claims "need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants. . . ." *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 at 726 (1966).

This case has progressed slowly through two years of litigation and is now at a point where all that is left is for a jury to hear and decide the question of just compensation to the defendants. The same issues and applicable law will apply to all defendants. To now dismiss the non-Indian defendants from this action and thereby force the plaintiff to proceed further anew against those defendants in state court would be a needless waste of judicial time. This is true whether settlement is in fact reached by the Indian defendants or not. See *United States* v. *Hyde Construction Co.*, 258 F. Supp. 255 (N. D. Okl. 1966); *Webb* v. *Bladen*, 480 F.2d 306 (4th Cir. 1973).

The Court concludes that it has the power to hear the condemnation action against the defendant Darks and further concludes that in its discretion such power should be exercised under the doctrine of pendent jurisdiction.

As to defendant Darks' claim that the land in question may only be obtained by purchase after competitive bidding, the Court finds this contention to be meritless. The statutes cited by the defendant in no way repeal 25 U.S.C. §357 and in no way abrogate the state's power of eminent domain.

In his brief defendant Darks claims that under 35 Stat. 312 only a right of way for public purposes over allotted lands may be condemned. There is nothing in the language of 35 Stat. 312 which implies that 25 U.S.C. §357 was repealed. Furthermore, in the case of *Town of Okemah* v. *United States*, 140 F.2d 963 (10th Cir. 1944) the Court held that 25 U.S.C. §357 gave jurisdiction to the federal courts in a case where the fee title to restricted Indian land was being condemned. The Court concludes that this statute is applicable whether the estate being taken is the fee simple or an easement for underground gas storage, as in this case.

The motion to dismiss is accordingly denied this 1st day of August, 1975.

s/ Joseph W. Morris
United States District Judge

FILED
AUG. 12, 1975

By .....
Clerk, U. S. District Court
CHARLES N. HASKELL
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma corporation, Plaintiff,	)	
-vs-	)	No. 73-186-C
An Easement for the Preparation etc. of a Gas Storage Facility etc. in Hughes County, Oklahoma, and THE UNITED STATES OF AMERICA etc. and ELIZABETH STAR, BEADEN HOPE, FRANCES WESLEY WOOD, WARNER TEBE, ARTHUR TEBE, POLLY TEBE, JOHN TEBE, CHARLIE TEBE, HARRY CARBITCHER, MALINDA HARJO, SAMPSON HARJO, MOLLY MAE BROWN, BUSTER BROWN, JOSEPHINE BROWN, WISEY MAE BROWN, TOOTSIE BROWN, AGNESS LUCAS, LOUIS HOPIA, SUSIE LASLEY, MAXWELL DARKS, P. G. PARKS and MARVIN OLIVO, Defendants.	)	

ORDER DETERMINING OIL AND GAS LEASES
TO BE VALID ON DATE OF TAKING

On December 31, 1974, this Court entered an order which provided in part as follows:

> "It is the Court's view that if the plaintiff owned valid and subsisting oil and gas leases on the tracts of land in question at the time of taking, then the defendant mineral interest owners are only entitled to the value of 1/8th of the economically recoverable gas reserves in the Channel Booch formation in and under each tract. If there is a genuine issue of fact concerning whether or not plaintiff's oil and gas leases were valid and subsisting with respect to any or all of these tracts, it may be necessary to hold an evidentiary hearing to determine this question."

An evidentiary hearing has been held to determine whether valid and subsisting oil and gas leases were owned by the condemnor, Transok Pipe Line Company, on Tracts 3 and 6 on October 1, 1973, the date of taking. The defendant Parks owns a one-half mineral interest in and under Tract 3. Parks, as to his one-half mineral interest, is a successor in interest to the original lessor. Transok Pipe Line Company is a successor in interest to the original lessee. The oil and gas lease is dated August 15, 1946, and provides in part as follows:

> "1. Lessor, in consideration of a cash bonus of $710.40, paid to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, receipt of which is hereby acknowledged, and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove and dispose of all the oil and natural gas deposits in or under the following described tracts of land situated in the county of Hughes, State of Oklahoma, and more particularly described as follows:
>
> The West Half of the Northeast Quarter of Section 28, Township 8 North, Range 11 East

containing 80 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the terms of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land."

The defendant Olivo owns a 1/24th mineral interest in and under Tract 6. Olivo, as to his 1/24th mineral interest, is a successor in interest to the original lessor. Transok Pipe Line Company is a successor in interest to the original lessee. This lease is dated November 14, 1950, and provides in part as follows:

"1. Lessor, in consideration of a cash bonus of $1408.00, paid to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, receipt of which is hereby acknowledged, and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following described tracts of land situate in the county of Hughes, State of Oklahoma, and more particularly described as follows:

The NORTHEAST QUARTER (NE) of SECTION 36, TOWNSHIP 8 NORTH, RANGE 10 EAST,

containing 160 acres more or less, together with the right to construct and maintain thereupon all works buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations or other structures necessary to the full enjoyment hereof for a term of 10 years from and after

the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land."

Each of the foregoing oil and gas leases was approved by the Secretary of Interior shortly after the execution of the lease. Each of the foregoing oil and gas leases provides for an advance rental of $1.25 per acre per year and a royalty of 12½% "of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein. . . ." Thus, examination of the habendum clause of the oil and gas lease reveals that the lease is perpetuated beyond the primary term for so long as "oil and/or gas is produced in paying quantities from said land." The effective date of taking by the plaintiff condemnor was October 1, 1973. The primary term of the oil and gas lease on Tract 3 expired on September 12, 1956. The primary term of the oil and gas lease on Tract 6 expired on December 8, 1960.

Parks and Olivo, as successor lessors, contend that the oil and gas leases were not valid and subsisting leases on the date of taking because on that date they were not producing "in paying quantities." The pertinent evidence introduced in support of this contention is scanty. It consists for the most part of copies of the oil and gas leases and certain monthly production reports required to be filed by the lessee showing the amount of production from the lease.

With respect to Tract 3 monthly production reports are submitted for the months of August and September, 1973. The monthly report for the month of August shows that a gas well identified as Well No. 1, located in the Northwest Quarter of the Northeast Quarter of Section 28, produced 120,000 cubic feet of gas. The monthly report for the month of September, 1973, shows that there was no production during that month and there is a statement on the face of the report which reads "FINAL REPORT—WELL CONVERTED TO GAS STORAGE."

With respect to Tract 6 the oil and gas lease shows that it was not until February 12, 1974 (after the date of taking) that the lease was cancelled by the Bureau of Indian Affairs. The lessee's monthly reports show the production of gas to be 798,000 cubic feet for the month of March, 1973, and no production during the months of April through September of 1973. The report for the month of September shows the following notation: "FINAL REPORT—WELL CONVERTED TO GAS STORAGE."

Although the oil and gas leases in question originally covered minerals owned by restricted Indians and were executed on Department of Interior lease forms, the mineral interests now owned by Parks and Olivo are unrestricted. Furthermore, even if the minerals in question were owned by restricted Indians, there is no reason to conclude that the phrase, "production in paying quantities," as used in this lease form, would have a meaning any different than that which is universally recognized by the authorities on oil and gas law. "Paying production, or production in paying quantities, is usually defined as that quantum of production that would return a profit to the lessee, however, small, over production costs." Hemingway, *The Law of Oil and Gas*, §6.4 at p. 254. This same principle has been recognized by the Supreme Court of Oklahoma, where the Court has put it this way:

> "In Henry v. Clay, Okl., 274 P.2d 545, this court held in the syllabus:
>
> 'The term "paying quantities", as used in an oil and gas lease, means paying quantities to the lessee. If the well pays a profit, no matter how small, over operating expenses, it produces in paying quantities, though it may never repay its cost and the operation as a whole may prove unprofitable.' " *Kerr* v. *Hillenberg*, 373 P.2d 66 at 68 (1962).

And it does not appear that there is any real dispute between the parties concerning this principle of law.

Although Parks and Olivo contend that the oil and gas leases terminated after the primary term because they were not producing in paying quantities, they failed to adduce any evidence whatsoever concerning what the operating expenses were or over what period of time the leases failed to produce in paying quantities. Professor Williams, in addressing himself to this problem, has put it this way:

> "One of the most perplexing problems involved in determining whether production is in paying quantities involves fixing the accounting period—the period of time over which the Court will determine whether the lessee has been producing in paying quantities. Obviously, this determination cannot be made on a day to day basis, and accordingly the courts have held that a reasonable period of time must be employed to see if the lease has been producing in paying quantities." Williams, *Oil and Gas Law*, §604.6(c).

Because the record is devoid of any evidence which goes to the question of operating expenses or which goes to the time period over which the leases are said to have produced a quantum of gas which is said to be insufficient in amount to cover operating expenses, the Court finds that the leases had not expired because of failure to produce gas in paying quantities prior to October 1, 1973, the date of taking.

The real contention by Parks and Olivo seems to be that because the monthly reports on Tract 3 show that no gas was produced during the month of September, 1973, and on Tract 6 show that no gas was produced from April through September, 1973 (a period of six months), that the leases terminated prior to the taking on October 1, 1973. The question before the Court, then, is whether this temporary cessation of production resulted in a termination of the leases prior to the taking date. The law is clear that *permanent* cessation of production after expiration of the primary term will result in termination of the oil and gas lease. Professor Williams has stated the rule thusly:

> "Upon permanent cessation of production in the secondary term, the vast majority of courts hold that the lease will automatically terminate. Logically, cessation of production in the secondary term has the identical effect under the habendum cause as lack of production at the end of the primary term. Practically, however, a different problem is presented, for by obtaining production the lessee has fulfilled his obligation and achieved the primary objective of the lease. Therefore, the courts will not be as quick, once there has been production in the secondary term, to terminate the lease and deprive the lessee of his investment." 3 Williams, *Oil and Gas Law* §604.2.

The law is also clear that a temporary cessation of production does not necessarily result in a termination of the oil and gas lease.

> "Under some circumstances, a lease may be preserved in the secondary term during a 'temporary' cessation of production, and in some cases the courts have been quite liberal in finding that a somewhat prolonged period of cessation was temporary.'" 3 Williams, *Oil and Gas Law* §604.2.

See also Hazlett, "Effect of Temporary Cessation of Production on Leases and Term Royalties," Southwestern Legal Foundation Tenth Annual Institute on Oil and Gas Law and Taxation 201 (1959).

In this case the evidence shows that with respect to Tract 3 there was no production during the month of September, 1973. With respect to Tract 6 the evidence shows that there was no production for a period of six months prior to the taking. The Court takes judicial notice of the pleadings and exhibits filed in this case which reveal that the complaint in this case was filed on June 25, 1973, and a petition was filed in the District Court of Hughes County, State of Oklahoma, on May 4, 1973, by plaintiff seeking

condemnation for underground gas storage purposes of certain tracts of land other than those involved in this case. It is thus apparent that the lessee contemplated at that time a change in operations from that of primary production of gas to a utilization of the reservoir as a gas storage reservoir.

In *Kerr* v. *Hillenberg*, 373 P.2d 66 (Okla. 1962), a somewhat analogous situation was before the Supreme Court of Oklahoma. In that case there was a cessation of production for a period of from six months to a year between the time a lease was being operated under primary production methods and a time when it was to be operated under secondary production methods. It was contended by the lessor that because the oil and gas lease ceased to produce for a period of from six months to a year after the expiration of the primary term, that the lease had expired because of cessation of production. The Court concluded that the lease had not expired and in the syllabus, the court put it this way:

> "Where there is a temporary cessation of production after the expiration of the primary term of a lease which was to continue for a fixed term and as long thereafter as oil or gas or either of them was produced from said land, the lease continues in force unless the period of cessation, viewed in the light of all the circumstances, is for an unreasonable length of time." 373 P.2d 66 at 67.

In *Cotner* v. *Warren*, 330 P.2d 217 (Okla. 1958) the Oklahoma Supreme Court also had before it the question of whether or not a temporary cessation of production resulted in a termination of the lease. In that case a dispute arose among various co-tenant lessees and there was no production from the lease for a period of from five to six months. It was contended by the lessors that cessation of production resulted in termination of the oil and gas lease. In conclud-

ing that the lease had not expired the Court placed reliance upon a Kentucky case and stated:

> "The Kentucky court, in the case of Lamb v. Vansyckle, 205 Ky. 597, 266 S.W. 253, 254, had before it a factual situation much the same as here involved. In that opinion it was said:
>
> > 'Nor are we willing to adopt the rule that a lease which is to continue for a definite period, and so long as oil or gas is produced in paying quantities, ipso facto terminates whenever production or development ceases for a brief period of time. On the contrary, we have reached the conclusion that the only fair and just rule is to hold that the lease continues in force unless the period of cessation, viewed in the light of all the circumstances is for an unreasonable time.'
>
> "The quoted rule seems to be the most equitable one in such cases.
>
> * * * * * *
>
> "After thorough deliberation, we conclude that the rule quoted above from the Lamb v. Vansyckle case is the soundest and most equitable and the same is adopted. Under that rule, the controlling factual finding is whether or not the temporary stoppage in production was for an unreasonable length of time." 330 P.2d 217 at 219.

The evidence in this case shows that there was no production from the lease on Tract 6 for a period of six months prior to the taking but also shows that the lease was not cancelled of record until February 12, 1974, by the Department of Interior. The evidence further shows that there was no production from the lease on Tract 3 for a period of one month prior to the taking. It was obviously contemplated that the reservoir from which the gas was being produced, although still productive, could be better

utilized for conservation purposes as a gas storage reservoir. And this Court has already determined that if the leases were in full force and effect on October 1, 1973 (the date of taking) that Parks and Olivo will be entitled to recover in this condemnation proceeding as mineral interest owners "the value of 1/8 of the economically recoverable gas reserves in the Channel Booch formation in and under each tract." It should be noted in this regard that insofar as any other formation, either above or below the Channel Booch formation, Parks and Olivo are entitled to execute oil and gas leases covering their respective interests and are entitled to any bonuses, rentals or royalties which may be payable under such leases.

In view of the short period of time involved in which there was no production on Tracts 3 and 6 and in view of the other facts and circumstances, the Court finds and concludes that the cessation of production with respect to each such lease was temporary in nature and that on October 1, 1973, the day of taking, each of these oil and gas leases was a valid and subsisting lease and had not terminated prior to that date by reason of cessation of production.

ORDERED this 12th day of August, 1975.

s/ Joseph W. Morris
United States District Judge

FILED
AUG. 22, 1975

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma Corporation,

Plaintiff,

vs.

An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma,

AND

The United States of America, et al.,

Defendants.

Case No. 73-186 Civil

JOURNAL ENTRY OF JUDGMENT
AND ORDER OF DISTRIBUTION

This matter comes on to be heard on this 22nd day of August, 1975, upon the Stipulation and joint motion of Plaintiff and Defendant, The United States of America, Guardian and owner of the legal title to said land for the use and benefit of certain Restricted Indians, for a judgment, at which time the Plaintiff appeared by its Attorney, Andrew Wilcoxen, and the Defendant, The United States of America, Guardian, appeared by Edwin L. Gage, Assistant United States Attorney for the Eastern District of Oklahoma, and said parties in open court having agreed that

this matter might be heard without further notice, and the Court fully advised in the premises, finds:

1.

This is an action of a civil nature brought by the Plaintiff, Transok Pipe Line Company, an Oklahoma corporation, against the United States of America, Guardian of the legal title to the lands involved in this action, which lands has heretofore been allotted in severalty to certain Restricted Indians who are wards of the United States of America, for the taking and appropriation under the power of eminent domain of an easement and rights over the tract of land hereinafter described, and for the ascertainment and award of just compensation to the owner and parties interested therein. Jurisdiction in this cause arises out of the Act of Congress of May 3, 1901, Chapter 832, Sec. 3, 31 Stat. 1084, 25 USCA Sec. 357, 52 Okl. Stat. Annotated, Sec. 22 and 27, Sec. 36.1 to 36.7, and 66 Okl. Stat. Annotated, Sec. 51 to 60 inclusive. Rule 71A(k) of the Federal Rules of Civil Procedure apply.

2.

Plaintiff is a corporation organized and existing under the laws of the State of Oklahoma, and is engaged, as authorized by its Articles of Incorporation, in the business of transmitting and transporting natural gas for public purposes, and is a Natural Gas Public Utility as defined by 52 Okl. Stat. 36.1 et seq., and that it is necessary for Plaintiff in the furtherance of its public business to acquire certain easements and rights across lands hereinafter described, and Plaintiff is authorized to exercise the right of eminent domain for the purpose of taking and appropriating such easements and rights across said lands for the purposes hereinafter set forth which it has been unable to obtain by private negotiations.

3.

It is necessary for Plaintiff to take and appropriate easements and rights for the construction, operation, maintenance and use of the lands described hereinafter for the purposes of the underground storage of natural gas, including the right to construct pipelines, drill wells, and enter upon said properties in the proper use and operation of such underground natural gas storage fields, together with the right to continue to use certain existing natural gas wells, the leasehold interest in which was acquired by Plaintiff prior to the implementation of its underground natural gas storage project. That Defendant, The United States of America has not filed in this cause any defense or objection to the taking and appropriation of such easements and rights as set forth in Plaintiff's Complaint, and therefore, has waived such defense or objection.

4.

That the Plaintiff and Defendant, The United States of America, Guardian, filed a Stipulation herein agreeing that the evidence which would be presented by each as to the damage and injury arising by reason of the appropriation of the aforesaid easements and rights would be identical as to the amount thereof and, therefore, no issue remains to be presented to a jury.

5.

That the Defendant, United States of America, Guardian, and the Plaintiff, Transok Pipe Line Company, have each filed a Demand for Jury Trial and that said Defendant and Plaintiff have withdrawn such Demands.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff, Transok Pipe Line Company, have and recover judgment against the Defendant, The United States of America, Guardian of the legal title in said lands for the use and benefit of certain Restricted Indians, con-

demning and vesting in Plaintiff a perpetual easement and rights to construct, maintain, use and operate its gas storage facility with all rights necessary thereto as set out in the Complaint herein together with the right to continue to use, maintain, and operate existing pipelines owned by Plaintiff and located upon the following described lands and the right to continue to use, operate and maintain the existing wells from the surface to the base of the Channel Booch formation together with the equipment appurtenant thereto, presently owned by Plaintiff located upon the following described lands, all situated in Hughes County, Oklahoma.

Tract 1: The East Half (E½) of the Southeast Quarter (SE¼) of Section 21, Township 8 North, Range 11 East, containing 80 acres, more or less with respect to one-half the surface interest and all of the mineral interest.

Tract 2: The West Half (W½) of the Southwest Quarter (SW¼) of Section 22, Township 8 North, Range 11 East, containing 80 acres more or less with respect to the mineral interest only.

Tract 3: With respect to the mineral interest only.

Tract 3: The West Half (W½) of the Northeast Quarter (NE¼) of Section 28, Township 8 North, Range 11 East, containing 80 acres more or less, with respect to one-half of the mineral interest only.

Tract 4: The West Half (W½) of the Northeast Quarter (NE¼) of Section 29, Township 8 North, Range 11 East, containing 80 acres more or less, with respect to the mineral interests only.

Tract 5: The Southeast Quarter (SE¼) of Section 30, Township 8 North, Range 11 East, containing 160 acres more or less with respect to the surface and mineral interests in their entirety and upon which a 16-inch pipeline has been constructed and upon which a 4-inch pipeline has been constructed.

Tract 6: The Northeast Quarter (NE¼) of Section 36, Township 8 North, Range 10 East, containing 160 acres more or less, with respect to an undivided 23/24ths of the mineral interest only.

Tract 7: The North Half (N½) of the Northwest Quarter (NW¼) (Lots 3 and 4) of Section 1, Township 7 North, Range 10 East, containing 78.89 acres more or less, with respect to the surface and mineral interests in their entireties.

Which easements and rights shall include the right, privilege and authority of ingress and egress to said properties for the purposes of operating, maintaining, repairing and removing pipelines and other facilities necessary and incident to the use of said lands for the purposes of operating and maintaining its underground natural gas storage facility, provided that any damage which may be done by Plaintiff in future entries for the aforesaid purposes will be compensable to Defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States of America, Guardian of restricted interests in said lands, have and recover judgment against Plaintiff for the use and benefit of certain Creek Indians in the amount of $30,358.49 which is determined to be the compensation and damages to which said Defendant Creek Indians are entitled by reason of the taking and appropriation of the easement and rights hereinbefore described, and that the Clerk of this Court be and hereby is directed to disburse said sum as follows:

Tract 1:

Agnes Lucas now Wesley ..... $ 2,543.86
Rt. 1, Wetumka, OK 74883

Louis Hobia ..... $ 543.87
Rt. 1, Wetumka, OK 74883

Susie Lasley now Martinez ..... $ 543.87
Rt. 1, Wetumka, OK 74883

Tract 2:

Agnes Lucas now Wesley ..... $ 543.87
Rt. 1, Wetumka, OK 74883

Louis Hobia ..... $ 543.87
Rt. 1, Wetumka, OK 74883

Susie Lasley now Martinez ..... $ 543.86
Rt. 1, Wetumka, OK 74883

Tract 3:

Beaden Hope ..... $ 815.80
Rt. 2, Box 287, Henryetta, OK 74437

Tract 4:

Bureau of Indian Affairs Individual Indian)
Money Account of Amos Yargee, 7/8 Blood)-$ 1,631.60
Creek NB-940, Deceased)
c/o Area Director, Bureau of Indian Affairs
Federal Building, Muskogee, OK 74401

Tract 5:

Bureau of Indian Affairs Individual Indian)
Money Account of Frances Joyce Wesley now)-$13,967.20
Wood, Full Blood Creek-Choctaw, unenrolled)- 8,994.80*
c/o Area Director, Bureau of Indian Affairs $ 4,972.40
Federal Building, Muskogee, OK 74401

*This amount distributed pursuant to Order dated August 22, 1975.

Tract 6:

Yarner Tebe ..... $ 543.87
Rt. 1, Sasakwa, OK 74867

Arthur Tebe ..... $ 543.87
601 North Miller, Oklahoma City, OK 73120

Polly Tebe now Brown ..... $ 543.87
Rt. 1, Holdenville, OK 74848

John Tebe ..... $ 543.87
Rt. 1, Box 184, Konawa, OK 74849

Charlie Tebe ..... $ 543.87
Rt. 1, Sasakwa, OK 78467

Harry Carbitcher ..... $ 135.96
728 S.E. 13th Street, Oklahoma City, OK 73125

Sampson Harjo ..... $ 135.96
526 West 11th Street, Holdenville, OK 74848

Bureau of Indian Affairs Individual Indian Money Account of Malinda Harjo a/k/a Marinda Harjo, ¾ Blood Creek-Seminole, unenrolled) -$ 135.96
c/o Area Director, Bureau of Indian Affairs
Federal Building, Muskogee, OK 74401

Tract 7:

Molly Mae Brown ..... $ 1,110.70
Rt. 1, Holdenville, OK 74848

Buster Brown ..... $ 1,110.69
Rt. 1, Holdenville, OK 74848

Josephine Brown ..... $ 1,110.69
Rt. 1, Holdenville, OK 74848

Wisey Mae Brown ..... $ 1,110.69
Rt. 1, Holdenville, OK 74848

Tootsie Brown ..... $ 1,110.69
Rt. 1, Holdenville, OK 74848

s Joseph W. Morris
DISTRICT JUDGE

APPROVED AS TO FORM:

s/ Andrew Wilcoxen
Andrew Wilcoxen
Attorney for Plaintiff

s/ Edwin L. Gage
Edwin L. Gage
Assistant United States Attorney
United States of America,
Guardian of restricted
interests of certain Creek Indians

FILED
DEC 31 1975
CHARLES N. HASKELL
Clerk, U. S. District Court
By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE CO.,)
)
Plaintiff,)
-vs-) No. 73-186-C
)
AN EASEMENT, etc.,)
Defendants.)

ORDER GRANTING PLAINTIFF'S MOTION
FOR NEW TRIAL

This is a condemnation case. The sole question for the jury was to determine the just compensation to be awarded the landowners with respect to the surface and mineral interests in four different tracts of land. This Court has previously determined that the interest being taken by plaintiff

pursuant to 52 O.S. 36.1 et seq. is an easement for the underground storage of natural gas in the Channel Booch formation. There has been a legal severance of the mineral interest in each of the tracts of land involved and accordingly it was necessary for the jury to make a determination of the just compensation due to the mineral interest owners and to the surface interest owners separately. The respective tract owners, the nature of their interest, the size of the tract, and the just compensation awarded by the jury are as follows:

Tract 1—Maxwell Darks
Undivided 1/2 interest in the surface of an 80 acre tract—
$12,000.00

Tract 2—Maxwell Darks
Surface interest owner in an 80 acre tract—
$32,000.00

Tract 3—P. G. Parks
Undivided 1/2 mineral interest owner in an 80 acre tract
$520.00

Tract 6—Marvin Olivo
Surface interest owner in a 160 acre tract
$48,000.00

Tract 6—Marvin Olivo
Undivided 1/24 mineral interest owner in a 160 acre tract
$205.00

The plaintiff has filed a motion for new trial setting forth nine grounds. One of the grounds is that "the verdicts of the jury are excessive in each instance, except as to the minerals, and appear to have been given under the influence

of prejudice." The defendants Darks, Parks and Olivo have filed a response to the motion.

The defendant Darks has filed a motion for a new trial setting forth three grounds for the motion, each of which goes to the proper measure of damages. The plaintiff and the defendant Olivo have each responded to the defendant Darks' motion for a new trial. The defendants Parks and Olivo have not filed motions for a new trial.

Prior to the trial the Court ruled that the proper measure of damages wtih respect to a surface interest owner is to be determined by ascertaining the difference between the fair market value of each tract of land immediately before and immediately after it is burdened by the easement for underground gas storage and so instructed the jury that such was the proper measure of damages. For the jury's assistance the Court also submitted summaries of the evidence with respect to the surface interests in Tracts 1, 2, and 6 and advised the jury that the verdicts as to each tract must fall within the ranges of just compensation as shown by the summaries. The summaries are attached hereto as Exhibit 1. The just compensation awarded the surface interest owners by the jury was as follows:

Tract 1:	$12,000.00
Tract 2:	$32,000.00
Tract 6:	$48,000.00

The interest being taken by the plaintiff is an easement whereby it is granted the right to store gas in the Channel Booch sand formation found in and under each of the above mentioned tracts. That formation is approximately 60 feet thick, lies at a depth of approximately 2500 feet below the surface and underlays approximately 3650 acres of land in Hughes County. Natural gas will be injected into this reservoir and will occupy the pore space in the sand which was once productive of dry gas and has been found by the Corporation Commission to be ideally suited for the un-

derground storage of natural gas. The defendant surface owners of such tracts will be permitted to continue to use their land and the evidence is unequivocally clear that they have used their land for whatever purpose they see fit, including pasture, farming, grazing, etc. Furthermore, under the terms of the taking, the plaintiff is obligated to pay the surface owners for all damages to growing crops, timber, fences and improvements occasioned by any future construction of pipelines, the drilling of wells, or other acts of the plaintiff in exercising its rights under the easement.

Based upon the evidence adduced and the full range of uses which the surface owner defendants continue to have with respect to the surface tracts in question, the Court concludes that the damages or just compensation awarded by the jury in this case are grossly excessive. The Court is well aware of the fact that the range of "before and after" values as presented by the defendants and as presented by the plaintiff represented the ultimate in extremes. The plaintiff adduced testimony that there was no diminution in value occasioned by the easement; the defendants adduced testimony that the imposition of the easement upon these surface tracts reduced their value to zero. In the Court's view both of these positions totally defy all practical realism and if the jury had found the just compensation to have been at or near the zero end of the spectrum, the Court would have concluded, based upon the evidence adduced at the trial, such an award to have been grossly inadequate.

Rule 59 of the Federal Rules of Civil Procedure provides in part as follows:

> "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . ."

The Tenth Circuit and other circuits have recognized time and time again that when the trial judge concludes, based upon all the evidence adduced, that the damages awarded are excessive, he may, in the interest of justice, grant a new trial. In *Holmes* v. *Wack*, 464 F.2d 86 (10th Cir. 1972) the Tenth Circuit approved the action of the trial judge in granting a new trial because of the excessiveness of the verdict and stated:

> "First, we consider the trial court's action in granting a new trial following the verdict in favor of the plaintiff at the first trial. The granting or refusal to grant a motion for new trial is governed by Rule 59 of the Federal Rules of Civil Procedure which embodies the common law precedents of the English and federal courts. Thus, state procedure is not applicable. See 6A Moore's Federal Practice Par. 59.05. The scope and extent of this power to grant a new trial is well described in the oft-cited opinion of the Fourth Circuit (opinion by Judge Parker) in Aetna Casualty & Surety Co. v. Yeatts, 122 S.2d 350 (4th Cir. 1941), wherein the late Judge Parker pointed out that a federal trial judge has ample power to see that justice is done, and where the ends of justice require it he has the authority to set aside the jury's verdict. Furthermore, where the trial court believes that the jury's verdict is against the weight of the evidence, a motion for new trial is proper. And where the court believes that the judgment for damages is excessive, that is, it is against the weight of the evidence, the court may order a remittitur and alternatively direct that there be a new trial if the plaintiff refuses to accept it.
>
> "In the instant case the court was of the opinion that the verdict was excessive and said so." 464 F.2d at 88-89

This rule has been followed by many courts and it is recognized by the authorities that granting a new trial under

such circumstances is a proper discretionary determination by a trial judge. 6A *Moore's Federal Practice*, Par. 59.05[5].

The defendant Darks, in his motion for new trial and in his brief, argues that this court erred in refusing to permit him to introduce evidence concerning damages caused by plaintiff in entering upon Tracts 1 and 2 prior to April 5, 1973. He argues that the Supreme Court of Oklahoma has entered an order prohibiting the prosecution of a separate action brought by him in state court for the recovery of these damages, the court saying that such damages must be recovered by him in connection with the condemnation proceeding. In support of this argument he attaches as Exhibits A and B the orders, pleadings and briefs filed in the Oklahoma Supreme Court. The orders in those cases prohibit the further prosecution of an action filed by defendant Darks in state court on November 26, 1974. The writ of prohibition issued by the Oklahoma Supreme Court in each of two cases was filed on September 8, 1975. Defendant Darks also attaches as Exhibit C an affidavit wherein he sets out the alleged wrongful acts of the plaintiff which presumably form the basis for the action filed by him in state court on November 26, 1974.

Examination of the four cases cited by the Oklahoma Supreme Court in its orders granting writs of prohibition reveals that the court has held that damages which are caused *incident to a taking* in an eminent domain proceeding must be recovered in that proceeding. See *Delhi Gas Pipe Line Co.* v. *Swanson*, 520 P.2d 670 (1974); *Oklahoma City* v. *Wells*, 185 Okl. 369, 91 P.2d 1077 (1939); *Cities Service Gas Co.* v. *Heubner*, 200 Okl. 521, 197 P.2d 985 (1948), and *Graham* v. *The City of Duncan*, 354 P.2d 458 (1960). In each of those cases, however, the damages for which plaintiff seeks to recover occurred in connection with the taking of the land in question. For example, in *Graham* v. *The City of Duncan*, *supra*, the court noted: ". . . the broomcorn was appropriated by the city in connection with the

taking of the land upon which it was grown. . . ." 354 P.2d at 463. Such is not the case here. In this case the taking occurred on October 1, 1973. All of the acts of which defendant Darks complains occurred not in connection with the taking, but in fact occurred some five months *prior to* the taking. The foregoing cases do not stand for the proposition that in such a circumstance all such damages must be recovered in the condemnation action. Furthermore, Exhibits A and B attached to defendant Darks' motion for new trial show that there were pending and are pending in state court several condemnation proceedings with respect to several tracts which make up a part of defendant Darks' ranch. It appears that these condemnation proceedings were instituted in 1973 the takings occurred prior to the taking in this case. The Supreme Court of Oklahoma apparently concluded, in accord with the rule of law announced in the authorities mentioned above, that the action filed by defendant Darks on November 26, 1974, involved damages to land which were caused in connection with one or more of the condemnation proceedings pending in state court, and for that reason it issued the writ of prohibition. The pendency of this case was not mentioned in the Supreme Court's writ or in the pleadings.

For the reasons heretofore stated, the plaintiff's motion for new trial is granted with respect to the surface interests only of defendants Darks and Olivo in Tracts 1, 2 and 6. The defendant Darks' motion for new trial is denied.

ORDERED this 31 day of December, 1975.

s/ Joseph W. Morris
United States District Judge

SUMMARY—TRACT 1—SURFACE INTEREST
MAXWELL DARKS, LANDOWNER

Unit Owned: Undivided 1/2 interest in 80 acres (i.e., 40 acres)

Property Interest Taken: Easement for underground gas storage purposes in undivided 1/2 interest in 80 acres (i.e., 40 acres) and the continuing right to enter upon and use surface for purposes of preparing, examining, maintaining and operating the underground natural gas storage area.

WITNESSES FOR LANDOWNER

	Value Before Taking	Value After Taking	Just Compensation
Maxwell Darks	$700 per acre ($28,000 for a 1/2 interest)	No. figure given	Not Determinable
Victor W. Pryor, Jr.	$12,000	$ 0	$12,000

WITNESSES FOR TRANSOK PIPE LINE COMPANY

	Value Before Taking	Value After Taking	Just Compensation
Rolley Caplinger	$6,000	$6,000	$ 0

SUMMARY—TRACT 2—SURFACE INTEREST
MAXWELL DARKS, LANDOWNER

Unit Owned: 80 acres

Property Interest Taken: Easement for underground gas storage purposes in 80 acres and the continuing right to enter upon and use surface for purposes of preparing, examining, maintaining and operating the underground natural gas storage area.

WITNESSES FOR LANDOWNER

	Value Before Taking	Value After Taking	Just Compensation
Victor W. Pryor, Jr.	$38,500	$ 0	$38,500

WITNESSES FOR TRANSOK PIPE LINE COMPANY

	Value Before Taking	Value After Taking	Just Compensation
Rolley Caplinger	$10,000	$10,000	$ 0

SUMMARY—TRACT 3—MINERAL INTEREST
P. G. PARKS, OWNER

Unit Before Taking: 1/8 royalty interest in 1/2 of the economically recoverable gas reserves under tract

Property Interest: Taken: The economically recoverable gas reserves under tract in the Channel Booch Sand Formation.

WITNESS FOR OWNER

	Value on Date of Taking	Just Compensation of Reserves Taken
Victor W. Pryor, Jr.	$520.00	$520.00 (Parks' interest)

WITNESSES FOR TRANSOK PIPE LINE COMPANY

	Value on Date of Taking	Just Compensation of Reserves Taken
C. H. Keplinger	$145.00	$145.00 (Parks' interest)

SUMMARY—TRACT 6—SURFACE INTEREST
MARVIN OLIVO, LANDOWNER

Unit Owned: 160 acres

Property Interest Taken: Easement for underground gas storage purposes in 160 acres and the continuing right to enter upon and use surface for purposes of preparing, examining, maintaining and operating the underground natural gas storage area.

WITNESS FOR LANDOWNER

	Value Before Taking	Value After Taking	Just Compensation
Marvin Olivo	$48,000	$1,600	$46,400
Victor W. Pryor, Jr.	$61,500	$ 0	$61,500

WITNESSES FOR TRANSOK PIPE LINE COMPANY

	Value Before Taking	Value After Taking	Just Compensation
Rolley Caplinger	$24,000	$24,000	$ 0

SUMMARY—TRACT 6—MINERAL INTEREST
MARVIN OLIVO, LANDOWNER

Unit Before Taking: 1/8 royalty interest in 1/24 of the economically recoverable gas reserves under tract.

Property Interest Taken: The economically recoverable gas reserves under tract in the Channel Booch Sand Formation.

WITNESS FOR OWNER

	Value on Date of Taking	Just Compensation of Reserves Taken
Victor W. Pryor, Jr.	$205.00	$205.00 (Olivo's interest)

WITNESSES FOR TRANSOK PIPE LINE COMPANY

	Value on Date of Taking	Just Compensation of Reserves Taken
C. H. Keplinger	$58.00	$58.00 (Olivo's interest)

FILED
MAY 12, 1976
LEWIS L. VAUGHN
Clerk, U. S. District Court
By .....
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma corporation, Plaintiff, -vs- An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma, and THE UNITED STATES OF AMERICA, et al., Defendants.) No. 73-186-C

ORDER DENYING MOTION FOR LEAVE TO FILE COUNTERCLAIM

On May 7, 1976, the defendant Maxwell Darks filed a motion for leave to file counterclaim wherein he seeks permission to file the counterclaim pursuant to Rule 13(f) of the Federal Rules of Civil Procedure. He tersely argues in his brief that "justice requires that permission be granted to file a counterclaim." The counterclaim which defendant Darks seeks permission to file alleges that he is entitled to damages because the plaintiff, in the months of April and May, 1973, wrongfully and unlawfully trespassed upon his land, took down his fences and damaged his cattle, for which he seeks actual damages in the amount of $56,754.00 and punitive damages in the amount of $100,000.00.

This is a condemnation case in which plaintiff has taken an easement for underground storage of natural gas pursuant to 52 O. S. 36.1 et seq. This Court has previously determined that the date of taking of the easement on plaintiff's land for underground gas storage purposes was October 1, 1973.

This is the first time that defendant has requested permission to file a counterclaim seeking damages for a trespass which he alleges occurred five or six months prior to the date of taking. He did seek to have this condemnation action dismissed and requested the Court to issue a permanent injunction because he alleges that the plaintiff entered upon his land prior to the filing of the report of the Commissioners. Judge Daugherty entered an order on May 2, 1974, denying that motion and refusing to issue an injunction. In his order Judge Daugherty stated:

> "The Court declined to receive evidence on this complaint on the basis that if the same is true, which Plaintiff denies, the relief desired of dismissal of this action or a permanent injunction against Plaintiff from making further entry is inappropriate as a matter of law. Plaintiff's remedy of trespass is adequate and bars injunctive relief."

Defendant Darks continued to press for permission to adduce evidence concerning the alleged trespass in this condemnation action, and in my pretrial order filed on January 3, 1975, I made the following order:

> "Defendant Darks was ordered not to present at trial any allegations concerning alleged trespass or damage resulting therefrom. If any cause of action for such trespass may exist same shall not be prejudiced by this cause of action."

This case is set for trial on May 20, 1976, and notice of this setting was sent to counsel on March 16, 1976. Counsel urges in his motion that the recent decision by the Supreme Court of Oklahoma in *Allen* v. *Transok Pipe Line Company*, 47 OBAJ 956, decided April 20, 1976, held that allegations of trespass damage may be heard in conjunction with a condemnation case. The mandate in that case has not been issued. Furthermore, it is clear that that case does not *require* that a trespass cause of action and a condemnation cause of action must be tried together.

Defendant Darks states in his motion that this Court "entered its journal entry of judgment ordering payment for trespass damages to defendant, Francis Joyce Wesley, now Wood, a co-defendant in this cause, on August 22, 1975." Defendant's contention is erroneous. There was filed on August 22, 1975, a pleading styled "Stipulation as to Just Compensation, Withdrawal of Demand for Jury Trial and Motion for Judgment and Order of Disposition." Pursuant to that motion, in which the litigation had been settled between the adverse parties, the Court entered on August 28, 1975, a journal entry of judgment and an order of disposition. That journal entry of judgment was entered pursuant to the settlement agreement made and entered into between the parties.

Defendant Darks in his motion also argues that leave to file the counterclaim should be granted because a writ of prohibition against the Honorable Frank Seay, District

Judge of Hughes County, has been issued barring him from further proceedings in a separate trespass action brought by the defendant Maxwell Darks in state court. He states that a copy of the order is attached to his motion.

In the first place, the defendant Darks has failed to attach a copy of the order to the motion. In the second place, it is apparent on its face that any such writ of prohibition would have no effect whatsoever on the defendant Darks so far as this Court is concerned, and that writ cannot provide an excuse to defendant Darks for not seeking permission to file a counterclaim at a much earlier date here. No motion for leave to file a counterclaim has ever been filed before.

This case has been tried previously before a jury to determine just compensation. Following the trial of that case this Court granted plaintiff's motion for a new trial. Defendant Darks, in his motion for new trial, continued to object to the Court's refusal to permit him in that condemnation proceeding to introduce evidence concerning damages arising out of trespass which antedated the date of taking. In my order granting a new trial I again concluded that it was improper to admit such evidence in a condemnation case.

This case is on the eve of trial. It is incumbent upon the defendant Darks to satisfy the provisions of Rule 13(f). Defendant Darks has totally failed to satisfy those provisions. He knows that this case has been set for trial for almost two months. The interest of justice would not be served by permitting defendant Darks at this late date to file his counterclaim and the motion for leave to file the counterclaim is denied.

ORDERED this 12th day of May, 1976.

s/ Joseph W. Morris
United States District Judge

SUMMARY—TRACT 1—SURFACE INTEREST
MAXWELL DARKS, LANDOWNER

Unit Owned:	Undivided 1/2 interest in 80 acres (i.e., 40 acres)
Property Interest Taken:	Easement for underground gas storage purposes in undivided ½ interest in 80 acres (i.e., 40 acres) and the continuing right to enter upon and use surface for purposes of preparing, examining, maintaining and operating the underground natural gas storage area.

WITNESSES FOR LANDOWNER

	Value Before Taking	Value After Taking	Just Compensation
Maxwell Darks	$700 per acre ($28,000 for a 1/2 interest)	No figure given	Not Determinable
Victor W. Pryor, Jr.	$12,000	$ 0	$12,000

WITNESSES FOR TRANSOK PIPE LINE COMPANY

	Value Before Taking	Value After Taking	Just Compensation
Rolley Caplinger	$6,000	$5,600	$ 400

SUMMARY—TRACT 2—SURFACE INTEREST
MAXWELL DARKS, LANDOWNER

Unit Owned:	80 acres
Property Interest Taken:	Easement for underground gas storage purposes in 80 acres and the continuing right to enter upon and use surface for purposes of prepar-

ing, examining, maintaining and operating the underground natural gas storage area.

WITNESS FOR LANDOWNER

	Value Before Taking	Value After Taking	Just Compensation
Victor W. Pryor, Jr.	$38,500	$ 0	$38,500

WITNESS FOR TRANSOK PIPE LINE COMPANY

	Value Before Taking	Value After Taking	Just Compensation
Rolley Caplinger	$10,000	$9,200	$ 800

FILED
MAY 21, 1976
LEWIS L. VAUGHN
Clerk, U. S. District Court
By
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma corporation,

Plaintiff,

-vs-

No. 73-186-C

An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma,

Defendants.

VERDICT

We, the jury in the above entitled cause, duly empaneled and sworn, upon our oaths, make the following answers to the interrogatories hereinafter propounded:

(1) Tract No. 1—Surface Interest.

What do you find from a preponderance of the evidence is just compensation due to defendant Maxwell Darks with respect to his surface interest in Tract No. 1?

Answer: $1,000.00

(2) Tract No. 2—Surface Interest.

What do you find from a preponderance of the evidence is the just compensation due to defendant Maxwell Darks with respect to his surface interest in Tract No. 2?

Answer: $2,000.00

(3) Tract No. 6—Surface Interest.

What do you find from a preponderance of the evidence is the just compensation due to defendant Marvin Olivo with respect to his surface interest in Tract No. 6?

Answer: $5,600.00

s/ Betty Jo [illegible]
Foreman

[APPENDIX]

FILED
MAY 21, 1976
LEWIS L. VAUGHN
Clerk, U. S. District Court
By
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

Civil Action File No. 73-186-C

Transok Pipe Line Company, an Oklahoma corporation Plaintiff, vs. An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma. Defendants.	)	JUDGMENT

This action came on for trial before the Court and a jury, Honorable Joseph W. Morris, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that just compensation due to defendant, Maxwell Darks, in Tract No. 1, Surface Interest, be $1,000.00; that just compensation due to defendant, Maxwell Darks in Tract No. 2, Surface Interest, be $2,000.00; and that just compensation due to defendant, Marvin Olivo in Tract No. 6, Surface Interest, be $5,600.00.

Dated at Muskogee, Oklahoma, this 21st day of May, 1976.

s/ Lewis Vaughn
Clerk of Court

[APPENDIX]

FILED
United States Court of Appeals
Tenth Circuit
NOV 14 1977
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 76-1647, 76-1648 and 76-1972

TRANSOK PIPELINE COMPANY, an Oklahoma corporation, Plaintiff-Appellee, MAXWELL DARKS, MARVIN OLIVO, AGNES LUCAS NOW WESLEY, Defendants-Appellants.	)	Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 73-186)

Submitted: September 29, 1977

Andrew Wilcoxen (Kenneth W. East, on the brief), for Plaintiff-Appellee.

Carl Michael Smith and Robert G. Grove for Defendants-Appellants Maxwell Darks and Marvin Olivo.

Gary P. Snow for Defendant-Appellant Agnes Lucas now Wesley.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

The appellee Transok Pipeline Company brought this condemnation suit against Marvin Olivo, Maxwell Darks, and Agnes Lucas now Wesley, and a number of others. The purpose of the action was to condemn an easement for the underground storage of natural gas, pursuant to an Oklahoma statute, 52 O.S. § 36.3 et seq. Federal jurisdiction is said to arise under 25 U.S.C. § 357, which authorizes the condemnation of lands allotted in severalty to Indians in the same manner as lands owned in fee. Jurisdiction as to appellants Darks and Olivo, who are not Indians, rests on the fact that a number of restricted Indians, including the appellant here, Lucas now Wesley, and the United States government, the fee holder in trust of Indian lands, are all named as defendants. Darks' cotenant in one tract and the mineral owners in his and Olivo's property are restricted Indians. This presents a somewhat tenuous problem with respect to pendent jurisdiction over state claims against persons other than the defendants on the federal claim, where a common nucleus of fact is present in both the federal claims and the state claims.

The Indian defendants were represented by the United States Attorney for the Eastern District of Oklahoma. On August 22, 1975, the Assistant United States Attorney representing the Indian defendants and the attorney for Transok entered into a stipulation that there was no issue to be submitted to a jury. Judgment was entered in accordance with a stipulation as to the amount, and it was directed that this be distributed among the individual defendants. The appellant Lucas (now Wesley) signed a stipulation which she received in the mail and accepted the check that accompanied it. Now she claims that she did not fully understand the stipulation and had no contact with the attorney who represented her. On August 23, 1976, her effort with three other restricted Indian defendants to set aside the judgment was denied.

The Olivo and Darks cases were submitted to the jury on August 25, 1975, and verdicts were returned which the trial court held, on motion for new trial, to be excessive. A new trial was granted and at the second trial the awards were much less.

Darks was the owner of a one-half surface interest in 80 acres which was in tract 1. He owned the entire surface interest in the 80 acres of tract 2.

Olivo was the owner of a surface interest in tract 6, which was 160 acres. The mineral rights as to the Darks and Olivo tracts were owned by restricted Indians (so Darks and Olivo were seeking compensation for the diminution of their surface rights).

The evidence disclosed that the Darks' property here considered was part of a larger cattle ranch. The evidence also showed the land to be primarily suitable for farming and ranching. However, there was somewhat wooded area and a lake on the property. There was at least a contention that some of the area around the lake was suitable for residential development. Also, on the property was an abandoned oil and gas well and tract 2 was subject to an oil and gas lease.

The Olivo property was also primarily used for range and agriculture, and there was at least some possibility of residential development in the wooded parts of it. The Olivo property was also subject to oil and gas leases and had a pipeline across it. Olivo's testimony was that the new easement, the subject of the present litigation, would increase the pressure in the pipeline and that it might cause some danger.

The first jury award was for Darks, tract 1, $12,000; Darks, tract 2, $32,000; Olivo, tract 6, $48,000. As we have said, these verdicts were vacated and a new trial was granted to Transok. The court held that the verdicts were excessive when considered in the light of the fact that a

full range of uses remained to the owners. The motion for new trial of Darks with respect to certain damage issues was denied.

The second jury verdict which was rendered May 21, 1976, made the following awards: Darks, tract 1, $1.000; Darks, tract 2, $2,000; Olivo, tract 6, $5,600.

The appeal of Darks and Olivo seeks review of the court's action in vacating the first verdict and seeks to set aside the second verdict. However, the main thrust of the appeal is that the trial court erred in granting Transok's motion for new trial following the first awards, and that the court erred in certain of its rulings on evidence and discovery in both trials.

Wesley seeks review of the order denying the motion to set aside the judgment which was entered as a result of her acceptance of the check. She claims that she did not understand it and that the court lacked jurisdiction as to her and the other Indian defendants.

Specifically, Olivo seeks reversal on the following grounds:

1. That there is no federal jurisdiction as to him.

2. That the Oklahoma substantive and procedural law applied by the trial court as to the taking of property by eminent domain violated the Constitution of the United States.

3. That the trial court erred in granting a new trial on account of excessiveness of damages and overruling Darks' motion for a new trial.

4. That there was error on the part of the trial court in refusing to permit the presentation of evidence on damages including the value before and after the taking of Olivo's portion of the gas storage formation, and (b) value before and after taking of Olivo's wells and casing to the subsurface formation.

The specific contentions of the defendant-appellant Darks are the same as those raised by Olivo and, in addition, he argues other points such as lack of necessity for the taking under Oklahoma law. He also makes detailed arguments with respect to the trial court's refusal to allow at the second trial evidence as to severance damage and trespass damages to Darks' land prior to the date of taking.

I.

We first consider the argument that the district court did not have jurisdiction over the Indian defendants because the Secretary of the Interior was not served and was an indispensable party. For this proposition some language contained in United States v. Oklahoma Gas & Elect. Co., 127 F.2d 349, 354-55 (10th Cir. 1942), *aff'd*, 318 U.S. 206 (1943), is relied on. The court in that case did say by way of dicta that the Secretary is an indispensable party. It cited Minnesota v. United States, 305 U.S. 283 (1939), which contains a statement that the United States is an indispensable party to such an action. The Supreme Court did not refer to this issue in affirming the *Oklahoma Gas* decision. In a later case, Town of Okemah v. United States, 140 F.2d 963 (10th Cir. 1944), this court referred to the United States as an indispensable party and did not mention the Secretary as being an indispensable party. In accord is Semple, *Oklahoma Indian Land Titles Annot.* § 802 at 546 (1952). It is to be concluded that that one statement in *Oklahoma Gas* is not authority for the proposition that the Secretary is indispensable.

The appellants also rely on the Act of May 27, 1908, § 6, 35 Stat. § 312, which authorizes representatives of the Secretary to counsel and advise all allottees of restricted lands and to take such steps as are necessary to protect them or assist said allottees in acquiring and retaining possession of their restricted lands. Another statute, that of August 4, 1967, 61 Stat. § 731, authorizes the attorneys provided for by the Act to represent Oklahoma Indians before

state courts of Oklahoma. This provision does not purport to deal with representation of Indians in federal court and does not state that Indians must be represented by these attorneys.

The further statutory provision relied on is § 3(c) of the Act of August 4, 1947, 61 Stat. § 732, which states that no proceeding in which members of the Five Civilized Tribes are parties may be removed to a federal court except upon the recommendation of the Secretary. This, however, falls short of requiring the Secretary to be a party.

We conclude that all necessary parties were served and that the Indian defendants were properly represented. On this issue the trial court found that the government vigorously represented the Indian interests. Appellant Wesley (or Lucas) has not claimed otherwise.

Nor do we agree with counsel for the appellants that the approval of the Secretary was a prerequisite to condemnation. There is one statute, Section 11, Act of August 4, 1947, 61 Stat. § 734, which provides that no order of the Corporation Commission under the "oil and gas conservation laws of Oklahoma," affecting restricted Indian land shall be valid until submitted to and approved by the Secretary of the Interior. In this case it does not appear that the Secretary refused to approve the order nor does it appear that § 11, *supra*, makes approval by the Secretary necessary to this condemnation action.

Certification by the Corporation Commission under the "oil and gas conservation laws," 52 O.S. §§ 81-287, is designed to regulate the oil and gas industry. While a certificate is also required for condemnation of underground storage facilities under a different chapter, 52 O.S. § 36.4, formal condemnation proceedings in federal court are necessary before it can have any effect as to Indian land. Similarly, the consent of the Secretary is required in order for a state to acquire the rights of way across allotted lands under 25 U.S.C. §§ 311, 312, 319, 321, 323, but § 357 does not

impose such a requirement. Nicodemus v. Washington Water Power Co., 264 F.2d 614 (9th Cir. 1959); United States v. Oklahoma Gas & Elect. Co., *supra*. Undoubtedly Congress considered the safeguards available in federal judicial proceedings to be sufficient so that the permission of the Secretary was not required.

The other points such as the inadequacy of the Oklahoma Corporation Commission Order under 52 O.S. §§ 36.3 (b) and 36.4(b) are unfounded. Nor is there merit in the contention that § 357 only authorizes condemnation of the interests of original allottees and not the interest of heirs of allottees. *Oklahoma Gas, supra,* 318 U.S. at 207; Town of Okemah v. United States, 140 F.2d 963, 965 (10th Cir. 1944). Nor is the fact that the language in § 1, Act of May 27, 1908, 35 Stat. § 312 refers to the exercise of right of eminent domain over allotted lands, thereby precluding the taking of a subsurface facility. Such a reading of the statute would produce a ridiculous result.

II.

Both Darks and Olivo argue that there can be no jurisdiction because subject matter jurisdiction exists only because of 25 U.S.C. § 357, which allows the condemnation of lands allotted in severalty to Indians. Even if the United States court can exercise jurisdiction over the Indians, Darks maintains as does Olivo that there can be no jurisdiction exercised over them.

The appellants rely on United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). Particularly they rely on the language in United Mine Workers that if the state issues substantially predominate whether in terms of proof, scope, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice to be tried in state courts. The trial court reasoned that § 357, *supra*, authorized the condemnation of any lands in which restricted Indians held an interest.

The trial court said that even if the surface of the land were considered a separate subject matter under § 357, the court had pendent jurisdiction over the condemnation of Darks' and Olivo's lands. It further stated that it would be a waste of time to dismiss the non-Indian defendants after two years of litigation.

It should be noted that the Indian defendants settled before the trial.

We do not rely solely on the trial court's first theory that § 357 confers federal jurisdiction over non-Indians who hold an interest in land in which allotted Indians also hold an interest.

In United Mineworkers v. Gibbs, *supra*, the Supreme Court said that for pendent jurisdiction to exist, the federal claims must have substance sufficient to confer subject matter jurisdiction on the court. The Court laid down the requirement that the state and federal claims must derive from a common nucleus of operative fact, and the additional test that was used was whether the claims are such that the plaintiff would ordinarily be expected to try them all in one judicial proceeding. It added that pendent jurisdiction may be exercised by the court in a particular case when "Its justification lies in considerations of judicial economy, convenience and fairness to litigants." *Id.* at 726.

In *Gibbs* there was no question of different defendants, but subsequent cases from the circuits have extended the *Gibbs* reasoning to pendent jurisdiction over state law claims against defendants over whom there is no independent basis of federal jurisdiction if the claim arose out of the same nucleus of operative fact as the federal claims applicable to another defendant. *See* Curtis v. Everette, 489 F.2d 516 (2d Cir. 1973), *cert. denied*, 416 U.S. 996; Almenares v. Wyman, 453 F.2d 10 (2d Cir. 1971), *cert. denied*, 405 U.S. 944; Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); F. C. Stiles Contracting Co. v. Home

Insurance Co., 431 F.2d 917 (6th Cir. 1970). *But see* Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969).

In a 1976 case, Aldinger v. Howard, 427 U.S. 1 (1976), the Supreme Court discussed the subject of pendent party jurisdiction in the context of an action alleging violation of civil rights under 42 U.S.C. § 1983. A county employee there sued her supervisor, the commissioners and the county itself, claiming that her discharge violated her constitutional rights. The problem arose because there was no federal jurisdiction over the county under 28 U.S.C. § 1343(3) because the county was not suable as a "person" under § 1983.

The Court disapproved of adding a completely new party over whom the court would have no power under the Civil Rights Act. The Court thought that this was an unwarranted extension of the pendent jurisdiction doctrine. At the same time the Court was careful to limit its decision to jurisdiction under § 1343(3) and § 1983, *supra*. The Court said that other alignments of parties and claims might call for a different result, such as with federal torts claims where the grant of jurisdiction is exclusive against the United States, for only in the federal court could all of the claims be tried together.

Cases decided since the *Aldinger* case have construed it somewhat narrowly. *See* Ayala v. United States, 550 F.2d 1196 (9th Cir. 1977); Long Prairie Packing Co. v. Midwest Emery Freight, 429 F. Supp. 201 (D. Mass. 1977). This attitude is not necessarily justified from a reading of *Aldinger*, which can be read to indicate that there is power to exercise pendent party jurisdiction unless Congress has expressly or impliedly negated such power in a particular jurisdictional context. *See* Comment, 77 Calum. L. Rev. 127 (1977).

The federal claims must, however, be substantial. In our case the claims quite clearly arise out of the same factual nucleus and normally a condemnor would seek to have all interests in the property adjudicated in one action.

Furthermore, our case is similar to the test discussed in *Aldinger*; Under § 357, there is exclusive jurisdiction in federal court to try the federal claim, whereby there can be a trial of all of the claims only in federal court.

We finally consider whether there was an abuse of discretion in exercising pendent jurisdiction in this case by trying the non-Indian cases after the settlement of the Indian ones.

While there was language in *Gibbs* that if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Nevertheless, late cases seem to be contrary to this dictum. *See* Rosado v. Wyman, 397 U.S. 397, 404 (1970), where the Court ruled that mootness as to the federal question did not deprive a federal court of power to hear pendent state claims. The court said: "Mootness, . . . may not occur until after substantial time and energy have been expended looking toward the resolution of a dispute that plaintiffs were entitled to bring in a federal court." *Id.* *See* Hagans v. Lavine, 415 U.S. 528, 545-550 (1974). Therefore, the *Gibbs* dictum is not a restriction on the court's power but rather is a guide to the exercise of its discretion. It would seem that the state claim would not have to be dismissed as long as the federal claim is not dismissed for insubstantiality. Stated differently, unless insubstantiality is the situation, the federal court would have the power to decide the pendent claim. *See* State of Arizona v. Cook Paint & Varnish Co., 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 1327 (1977); Klaus v. Hi-Shear Corp., 528 F.2d 225 (9th Cir. 1975); Kavit v. A. L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974); Brunswick v. Regent, 463 F.2d 1205 (5th Cir. 1972); 3A Moore's Federal Practice, ¶ 18.07 [1.—3] & n. 41.

Exercise of power over the state claims has been approved despite dismissal of the federal claims where substantial amounts of time and energy have been spent in the

case. *See* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973). In that case a number of motions had been heard and a special master in charge of discovery had been appointed. The motion to dismiss was made on the eve of trial. Retention was upheld. *See also Klaus, supra; Kavit, supra.*

In the case at bar the federal claims are substantial. The complaint had been filed in July 1973, and for over two years the court had heard and decided motions and appointed commissioners to determine just compensation. The federal claims were settled in August 1975, just before trial. Finally, this would be a bad time to dismiss non-Indian claims after four years and two jury trials. It would be a shocking waste of time and money now to require this cause to be relitigated in the state court.

We have concluded that the trial court did not err in granting Transok motion for a new trial because of excessiveness of the verdicts.

The trial court properly instructed the jury as to the proper measure of damages and submitted summaries of the evidence and advised the jury that the verdict as to each tract had to fall within the ranges of just compensation as shown by the summaries submitted. In fact the verdicts turned out to be within the guidelines contained in the summaries. However, the amounts in each instance crowded the outside limit set in the range of figures furnished by the experts. It was because of this that the court ordered a new trial. The judge did so on the basis of this court's decision in Holmes v. Wack, 464 F.2d 86 (10th Cir. 1972). in which the breadth of the trial court's discretion to grant or deny a new trial was emphasized. *See also* Harris v. Quinones, 507 F.2d 533 (10th Cir. 1977).

Appellants would have us now hold that the trial court was in error in not offering as an alternative to the motion for new trial a proposal for a remittitur. They say that this was required. We disagree. If a remittitur is offered, the

alternative which is, so to speak, threatened is the granting of a new trial. It does not follow from this that every time a new trial is ordered it also must be accompanied by a proposal for remittitur.

A distinction is to be drawn between appellate review of a grant of a new trial and review of denial of a motion for new trial. In the latter, the appellate court may be less likely to reverse than in the former situation. Yet the standard is still abuse of discretion. *See* Taylor v. Washington Terminal Co., 409 F.2d 145 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 835, where the court said that they would reverse the granting of a new trial for excessive verdict only where the quantum of damages found by the jury was clearly within the maximum limit of reasonable range.

To the same effect are Gleason v. Hall, 555 F.2d 514 (5th Cir. 1977); Ehret Co. v. Eaton, Yale & Towne, Inc., 523 F.2d 280 (7th Cir. 1975); 6A Moore's Federal Practice ¶ 59.05[5].

In the present case the appellants' witnesses testified to a total loss of value as a result of the taking of the easement, and Transok's witnesses indicated no substantial taking and need for compensation at all. The judge in granting the new trial said that both positions were wrong. Considering the very limited taking and considering the fact that the awards approach the high marks, we are unable to see that the trial court abused its discretion in granting the motion for new trial.

IV.

Finally, we consider whether the trial court erred in its ruling on the reception of evidence and its instructions.

The underground area sought to be condemned was 2,500 feet beneath the surface that underlay about 3,640 acres in Hughes County, which property was owned by about 25 owners, according to appellants' estimate. Only a

part of this formation was considered in this condemnation action. There are related actions in the state court. We see no shortcoming in the trial court's instructions. It fairly defined the standards to be followed in making the award.

As to the evidence:

Appellants offered evidence of the value of the entire formation of the gas storage reservoir. This was apparently on the theory that compensation should amount to a percentage of the total value of the reservoir equal to defendants' percentage of the surface area over the reservoir. Such a formula would constitute a measure based upon the value to Transok rather than the value of the property taken. That the latter is the law in Okahoma is shown by McInturff v. Oklahoma Natural Gas Transmission Co., 475 P.2d 160 (Okla. 1970); Cases from other states are to the same effect. Home Gas Co. v. Miles,. 358 N.Y.S.2d. 846 (Sup. Ct. 1974); Midwestern Gas Transmission Co. v. Mason, 201 N.E.2d 379 (Ill. 1964).

Olson v. United States, 292 U.S. 246 (1934), is not relevant because here in contrast to *Olson* there is no possibility of the 25 owners combining to operate a storage facility so as to come within *Olson*. *See* 292 U.S. at 257.

Severance damages were sought based upon diminution in value of the entire ranch. The trial court instructed the jury to disregard this evidence. The court's exclusion of this was justified on the basis that the testimony as to reduction of the value of the entire ranch as a result of this easement was, to say the least, insubstantial. Nor did the trial court abuse its discretion in denying Darks permission to introduce evidence of alleged pretaking trespass.

The judgment of the district court is affirmed.

NOVEMBER TERM—December 12, 1977

Before The Honorable Robert H. McWilliams, Circuit Judge,
The Honorable James E. Barrett, Circuit Judge,
The Honorable William E. Doyle, Circuit Judge

TRANSOK PIPE LINE COMPANY,	)	
	)	
Plaintiff-Appellee,	)	No. 76-1647
	)	
vs.	)	No. 76-1648
	)	
MAXWELL DARKS, et al,	)	No. 76-1972
	)	
Defendants-Appellants.	)	

This matter comes on for consideration of appellants' petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy
Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

s/ Linda A. Carlson
Deputy Clerk

APPENDIX "C"

(Orders from companion cases)

FILED
MARCH 5, 1973

BEFORE THE CORPORATION COMMISSION OF
THE STATE OF OKLAHOMA

APPLICATION OF TRANSOK PIPE LINE COMPANY PURSUANT TO 52 O.S. 36.1 et seq. FOR A CERTIFICATE DECLARING THAT THE CHANNEL BOOCH FORMATION UNDERLYING NE/4 NE/4 SECTION 2, N/2 N/2 SECTION 1, TOWNSHIP 7N, RANGE 10E; E/2 SE/4 AND SE/4 NE/4 SECTION 35, S/2 AND NE/4 AND S/2 S/2 NW/4 SECTION 36, TOWNSHIP 8/N, RANGE 10E; SW/4 AND N/2 N/2 SE/4 AND N/2 SECTION 31; S/2 SW/4 AND SE/4 SECTION 30; N/2 NW/4 AND N/2 S/2 NW/4 AND N/2 N/2 NE/4 SECTION 32; S/2 AND NE/4 AND S/2 NW/4 AND NE/4 NW/4 SECTION 29; N/2 AND NW/4 SE/4 AND N/2 SW/4 AND N/2 S/2 SW/4 SECTION 28; S/2 SW/4 SE/4 AND SE/4 SE/4 SECTION 20; S/2 AND NE/4 AND SE/4 NW/4 SECTION 21; W/2 W/2 SECTION 22; W/2 NW/4 SECTION 27, TOWNSHIP 8N, RANGE 11E, HUGHES COUNTY, OKLAHOMA ARE SUITABLE FOR UNDERGROUND STORAGE OF NATURAL GAS AND THAT ITS USE FOR SUCH PURPOSES IS IN THE PUBLIC INTEREST.	)	CAUSE CD NO. 35868
	)	ORDER NO. 96291

REPORT OF THE COMMISSION

ORDER CORRECTING ORDER NO. 95952

This cause came on for hearing before R. F. Thweatt, Trial Examiner for the Corporation Commission of Oklahoma, on the 16th day of January, 1972, in the Commission's courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission, for the purpose of taking testimony and reporting to the Commission.

At the time of the hearing, Mr. Roger R. Scott, Attorney, and Mr. Charles B. Crane, Attorney, appeared for the applicant, *Transok Pipe Line Company*; Mr. William C. Majors appeared for Diamond L., Inc., and Mrs. James Logan; Mr. Maxwell Darks, Attorney, Hubert Douglas, Jr., Miller D. Jones, Ernest Allen, Ms. Elizabeth Star, Bert Wininger, Beaden Hope, and Ms. Frances Wood appeared for themselves. Mr. Harvey Cody, Conservation Attorney, appeared for the Commission.

The Trial Examiner heard the cause and filed his report recommending that the application be granted; time was allowed within which exceptions might be filed to said report, and none having been filed, the Commission being in executive session and being fully advised in the premises, therefore finds as follows:

FINDINGS

1. That this is an application of Transok Pipe Line Company for a certificate declaring that the Channel Booch Formation underlying NE/4 NE/4 Section 2, N/2 N/2 Section 1, Townhsip 7N, Range 10E, E/2 SE/4 and SE/4 NE/4 Section 35, S/2 and NE/4 and S/2 S/2 NW/4 Section 36, Township 8N, Range 10E; SW/4 and N/2 N/2 SE/4 and N/2 Section 31; S/2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S/2 NW/4 and N/2 N/2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N/2 SW/4 and N/2 S/2 SW/4 Section 28; S/2 SW/4 SE/4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE/4 NW/4 Section 21; W/2 W/2 Section 22; W/2 NW/4 Section 27, Township 8N, Range 11E; Hughes County, Oklahoma, are suitable for underground storage of natural gas and that its use for such purpose is in the public interest.

2. That the Commission has jurisdiction over the subject matter herein and no protests have been entered to the granting of the application.

3. That the applicant, Transok Pipe Line Company, is an Oklahoma corporation engaged in the business of transporting and transmitting natural gas by pipeline within the State of Oklahoma for ultimate public use, and qualifies as a natural gas public utility as defined in 52 Okla. Statutes 36.1.

4. That the Channel Booch Sand underlying the NE/4 NE/4 Section 2, N/2 N/2 Section 1, T7N, R10E; E/2 SE/4 and SE/4 NE/4 Section 35, S/2 and NE/4 and S/2 S/2 NW/4 Section 36, T8N, R10E, SW/4 and N/2 N/2 SE/4 and N/2 Section 31; S/2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S/2 NW/4 and N/2 N/2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N/2 SW/4 and N/2 S/2 SW/4 Section 28; S/2 SW/4 SE/4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE/4 NW/4 Section 21; W/2 W/2 Section 22; W/2 NW/4 Section 27, T8N, R11E, Hughes County, Oklahoma, is a dry gas reservoir, and the volumes of native gas originally in place therein are substantially depleted.

5. That the reservoir which is sought to be used for the underground storage of natural gas is ideally suited for such purpose and has a greater value or utility as a gas storage reservoir for the purpose of insuring an adequate supply of natural gas for applicant's consumers and for the conservation of natural gas, than for the production of the relatively small volumes of native gas which remain

therein, and that such storage of gas is necessary to permit the orderly withdrawal of natural gas at periods of peak demand so as to make more readily available the natural gas reserves of the State of Oklahoma to the consumers of this State; will provide a better year-round market to the various gas fields within the area; will promote the public interest and welfare of the State of Oklahoma; will prevent waste and protect the correlative rights of mineral owners, and is in the public interest.

6. That the Channel Booch Sand underlying the properties described in the application may be reasonably expected to be penetrated by gas displaced or injected into the proposed gas storage reservoir.

7. That no gas from said Booch Sand formation is being used for the secondary recovery of oil.

8. That said Booch Sand formation is not being used by others for the injection, storage, and withdrawal of natural gas in the area of the lands above described; that 2 BCF of native natural gas remains in the reservoir.

9. That the Channel Booch formation aforementioned in this application is identified by the log on the Adelman No. 1-B Well, located in the center of the NW/4 NW/4 of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2496 feet and a base at approximately 2556 feet.

10. That due to inadvertence and oversight when Order No. 95952 was prepared, the Channel Booch Sand, though named, was not identified as to depth or as to a previously drilled well log in the reservoir area, and this Correction Order is being issued to correctly reflect the testimony at the time of the hearing.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of the State of Oklahoma as follows:

1. That the application of Transok Pipe Line Company for a certificate declaring the Channel Booch Formation underlying the

> NE/4 NE/4 Section 2; N/2 N/2 Section 1, Township 7N, Range 10E; E/2 SE/4 and SE/4 NE/4 Section 35; S/2 and NE/4 and S/2 S/2 NW/4 Section 36, Township 8N, Range 10E; SW/4 and N/2 N/2 SE/4 and N/2 of Section 31; S/2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S/2 NW/4 and N/2 N/2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N/2 SW/4 and N/2 S/2 SW/4 Section 28; S/2 SW/4 SE/4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE/4 NW/4 Section 21; W/2 W/2 Section 22; W/2 NW/4 Section 27, Township 8N, Range 11E, Hughes County, Oklahoma,

are suitable for underground storage of natural gas, and that its use for such purposes is in the public interest, and that said application be, and the same is by this order granted.

2. That said Channel Booch formation is identified by the log on the Adelman No. 1-B well located in the center of the NW/4 NW/4 of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2496 feet and a base of approximately 2556 feet, and that such stratum or formation is suitable for the underground storage of natural gas. That the evidence in this cause shows that there are approximately 2 BCF of native gas remaining in this reservoir.

3. That Transok Pipe Line Company is authorized and empowered to use and operate the Channel Booch Sand underlying the described lands for the purpose of underground storage of natural gas, all in accordance with and subject to the limitations of 52 Okla. Statutes 36.1 et seq.

4. That applicant, Transok Pipe Line Company, will be the owner of all natural gas injected into the said Booch Sand Formation underlying the above-described lands, and no person other than said applicant shall have the right to produce, take, reduce to possession, waste, or otherwise interfere with, or exercise any control over such gas: provided, however that the owner of said lands, or of other rights or interests therein shall have the right to drill through said formation in such manner as shall protect said formation against pollution and the escape of natural gas therefrom, and in accordance with such orders, rules and regulations as the Commission may make for the protection of such underground storage.

5. That this Order should be and is hereby declared to be the Certificate required by 52 O.S. 1961, Sec. 36.4, as a condition precedent to the filing of the application or petition for condemnation of Transok Pipe Line Company in the courts of the State of Oklahoma.

DONE AND PERFORMED this 5th day of March, 1973.

CORPORATION COMMISSION OF OKLAHOMA

s/ Charles Nesbitt
Charles Nesbitt, Chairman

Ray C. Jones, Vice Chairman

s/ Rex Privett
Rex Privett, Commissioner

ATTEST:

s/ Ed Overholser
Ed Overholser, Secretary

FILED
HUGHES COUNTY
NOV 22 1974
LOIS MERCHANT, Court Clerk
By *Lois Merchant*
(Em)

IN THE DISTRICT COURT WITHIN AND FOR
HUGHES COUNTY, STATE OF OKLAHOMA

TRANSOK PIPELINE CO.,	)	
	)	
PLAINTIFF,	)	
VS.	)	No. C-73-93
	)	
HUBERT DOUGLAS, JR., ET AL.,	)	
	)	
DEFENDANTS.	)	

ORDER

Now on this 21st day of November, 1974, the Court having on October 24, 1974, heard several matters pending in the above cause and after taking said matters under advisement and careful consideration of all of the pleadings together with statements of counsel and the law, no evidence having been presented, finds as follows:

(1) Defendant's election to participate overruled.

(2) Defendant's motion to set aside appointment of appraisers overruled.

(3) Defendant's request for competitive bidding overruled.

(4) Defendant's amended exceptions to report of commissioners overruled.

(5) Defendant's motion to dismiss and request for permanent injunction overruled.

(6) Defendant's motion to dismiss overruled.

(7) Plaintiff's motion to strike motion to dismiss sustained.

(8) Defendant's motion for memorandum of interest sustained insofar as any prepared information setting out interest of ownership in the hands of the plaintiff which may be furnished for the Court's benefit in determining the interest herein.

(9) Defendant's exception to commissioners report overruled.

(10) Plaintiff's motion to approve report of commissioners and to confirm taking in condemnation is sustained.

(11) Defendant's application for temporary restraining order and injunction overruled.

(12) Plaintiff's exceptions and objections to commissioners report are denied and in this connection, the Court specifically finds that the partial dismissal filed by the plaintiff is ineffectual and that the defendant, Harry H. Diamond, Inc., is a necessary party to these proceedings.

(13) The Court further orders the plaintiff to deposit with the Court Clerk of Hughes County, Oklahoma, the amount of damages as set out by the commissioners in their report in favor of the defendant, Harry H. Diamond, Inc., within 20 days from this date.

The Clerk is instructed to make a minute reflecting these rulings and allowing each side exceptions to the Court's rulings.

s/ Rudolph Hargrave
RUDOLPH HARGRAVE
DISTRICT JUDGE

FILED
SUPREME COURT
STATE OF OKLAHOMA
SEP 8 1975
ROSS N. LILLARD, JR., Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Transok Pipe Line Company, a corporation, Petitioner,	)	
vs.	)	No.'s 48,708 & 48,709
Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	)	

ORDER

This matter comes on for hearing upon petitioners' application and petition for Writ of Prohibition against the Hon. Frank Seay, Respondent, seeking to prohibit said District Judge from further proceedings in causes No. C-74-250 & 251 pending in Hughes County, Oklahoma.

It further appearing to this Court that such last mentioned causes of action were filed by the owner of lands sought to be condemned and his alleged partner against the petitioner herein and that they sound in tort (trespass) and seek damages against the real premises and personalty located thereon.

This Court being fully advised in the premises, after hearing argument and for good cause shown, finds that petitioner is entitled to Writs of Prohibition against the Respondent, by virtue of our holdings in Delhi Gas Pipe Line Co. vs. Swanson 520 P.2d 670 (1974); Oklahoma City vs. Wells 185 Okl. 369, 91 P.2d 1077 (1939); Cities Service Gas Co. vs. Heubner 200 Okl. 521, 197 P.2d 985 (1948) and Graham vs. The City of Duncan 354 P.2d 458 (9160).

WRITS GRANTED.

DONE IN CONFERENCE THIS 8th day of September, 1975, under the superintending control granted this Court, Art. VII § 4 of the Oklahoma Constitution.

s/ Ben T. Williams
CHIEF JUSTICE

(Orders of the Supreme Court of the State of Oklahoma of December 9, 1975.)

* * * * * *

48,708 Transok Pipe Line Co. v. Frank Seay, Judge. Oral argument and rehearing denied.

48,709 Transok Pipe Line Co. v. Frank Seay, Judge. Oral argument and rehearing denied.

* * * * * *

s/ Ralph P. Hodges
(Acting) Chief Justice

IN THE SUPREME CORT OF OKLAHOMA

Wednesday, Nov. 16, 1977.

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDER:

48,054 Consolidated under 48,054.

48,055 Maxwell Darks -vs- Transok Pipeline Co.

48,056 Certiorari denied.

APPENDIX "D"

FILED
JAN. 20th, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Transok Pipe Line Co., an Oklahoma Corporation, Plaintiff,	)	D. Ct. No. 73-186
-vs-	)	Aps. Ct. No. 76-1972
Elizabeth Star, et al., Defendants	)	

AMENDED REQUEST TO DISTRICT COURT CLERK TO CERTIFY AND TRANSMIT RECORD

COMES NOW the undersigned Attorney representing Defendants, Maxwell Darks and Marvin Olivo in this lower court.

Under the provisions of Rule 21 of the Supreme Court of the United States, request is made to the Court Clerk to Certify and Transmit to the Supreme Court of the United States, Washington, D. C., only the following:

(1) All transcripts of various hearings including the hearing on July 24, 1973;

(2) Transcripts of the two jury trials held on August 25 and 26, 1975, and May 20 and 21, 1976;

(3) The Appendix, Appendix, Vol. I, and Appendix, Vol. II, filed with the United States Court of Appeals Tenth Circuit.

This request is made pursuant to intent of the above named defendants to file a Petition for Writ of Certiorari within ninety (90) days from the date of the final order of December 12, 1977, as authorized under 28 U.S.C. § 1254(1).

Respectfully submitted,

CARL MICHAEL SMITH
ATTORNEY FOR DEFENDANTS,
MAXWELL DARKS AND MARVIN OLIVO
550 United Founders Life Tower
5900 Mosteller Drive
Oklahoma City, Oklahoma 73112
(405) 848-8877

s/ By: Carl Michael Smith
CARL MICHAEL SMITH

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing AMENDED REQUEST TO DISTRICT COURT CLERK TO CERTIFY AND TRANSMIT RECORD has been mailed this 19th day of January, 1978, with sufficient postage fully prepaid thereon, to:

Andrew Wilcoxen
P.O. Box 357
Muskogee, Oklahoma 74401

Anne S. Almy
Appellate Section
Land and Natural Resources Division
Department of Justice
Washington, D. C. 20530

Gary P. Snow
123 N. Broadway
P.O. Box 472
Holdenville, Oklahoma 74848

s/ Carl Michael Smith
CARL MICHAEL SMITH

Supreme Court, U. S.
FILED
FEB 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1062

MAXWELL DARKS and MARVIN OLIVO,
Petitioners,

v.

TRANSOK PIPE LINE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ANDREW C. WILCOXEN
112 North Fifth Street
Muskogee, Oklahoma 74401

KENNETH W. EAST
P.O. Box 201
Tulsa, Oklahoma 74102

Attorneys for Respondents

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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CITATIONS

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1062

MAXWELL DARKS and MARVIN OLIVO,
Petitioners,

v.

TRANSOK PIPE LINE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The Opinions and Orders of the United States District Court in this case are not reported and are reprinted in Petitioners Appendix B. The Opinion of the Court of Appeals for the Tenth Circuit and Order denying Rehearings are unreported and are included in the Petition as Appendix B-81 through B-94.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Is the opinion of the Court of Appeals affirming the Order of the District Court in an award of condemnation damages correct?

2. Did the Court of Appeals correctly construe and apply this Court's decision in *United Mine Workers v. Gibbs*, 383 U.S. 715?

3. Did the lower Court have jurisdiction over subject matter and persons involved in the litigation?

4. Did the District Court err in its conduct of the condemnation proceedings and *assuming arguendo* that the Court did err does such error constitute a violation of due process and equal protection of the laws guaranteed by the United States Constitution?

STATUTES INVOLVED

31 Stat. 1084, 25 U.S.C. §357

§357 Condemnation of lands under laws of States

Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Title 52 Oklahoma Statutes §36.5

Any natural gas public utility having first obtained a certificate from the Commission as hereinbefore provided, desiring to exercise the right of eminent domain for the purpose of acquiring property for the underground storage of natural gas shall do so in the manner hereinafter provided. Such natural gas public utility shall present to the District Court of the country where the land is situated, or to the judge thereof, a petition setting forth the purpose for which said property is sought to be acquired, a description of the property sought to be appropriated and the names of the owners thereof as shown by the records of such county. The petitioner shall file the certificate of the Commission as part of its petition and no order by the Court granting said petition shall be entered without such certificate being filed therewith. The Court or the judge thereof shall examine said petition and determine whether the petitioner has the power of eminent domain and whether said property is necessary to its lawful purposes, and if found in the affirmative, such findings shall be entered in the record and subsequent proceedings shall follow the procedure now provided by law in the exercise of the rights of eminent domain by railroads.

STATEMENT

This case deals with the condemnation of specific property in Hughes County, Oklahoma for use as a natural gas storage facility. The land and mineral interests which were to be condemned were held by the United States for the use and benefit of certain restricted Indians. Within the land held for the use and benefit of the Indians, two non-Indians held land interests which were included in the same condemnation proceedings. The Respondent has chosen to

restate the operable facts in order to avoid the Petitioners penchant for distortion and combining fact and argument. (Pet. pp. 10-25)

The Transok Pipe Line Company is a wholly owned subsidiary of the Public Service Company of Oklahoma. It is engaged in the business of transporting and distributing natural gas by means of pipelines *within* the State of Oklahoma for ultimate public use.[1] (See Pet. App. B-7), and qualifies as a natural gas public utility as defined in the Oklahoma Statutes (See Pet. App. C-3). In January 1972, the Transok Pipe Line pursuant to the Oklahoma Statutes filed an application with the Corporation Commission of the State of Oklahoma for a certificate declaring that the Channel Booch Formation underlying certain specified tracts of land in Hughes County was suitable for underground storage of gas. After extensive hearings at which testimony and evidence were offered, the Corporation Commission issued its findings and order declaring that the applicant possessed the power of eminent domain and that the property was suitable for storage of gas and stating "That this Order should be and is hereby declared to be the Certificate required by 52 O.S. 1961 Sec. 36.4, as a condition precedent to the filings of the application or petition of Transok Pipe Line Company in the Courts of the State of Oklahoma.[2] Subsequently on or about June 25, 1973 Transok Pipe Line Company filed an action seeking condemnation of an "easement" for the preparation, the operation and use of certain

[1] Petitioners argued below and argue in this Court the requirement of an FPC Certificate of Convenience and Necessity (Petition p. 11). Yet there is and was no evidence showing Transok to be engaged in interstate activity. Even if it were so engaged, the condemnation procedure of Oklahoma would still apply to the Oklahoma land.

[2] Contrary to Petitioners' representation at page 11, the Commission found 2BCF of gas remaining in the reservoir (Pet. App. C-4).

tracts as a gas storage facility in the Channel Booch Formation. Joined in the proceeding were the United States and specific individuals for whose use and benefit the United States presently holds title to the surface land and mineral rights. All of the individuals with the exception of Darks and Olivo were restricted Indians, heirs of the original Indian Allottees, members of the Five Civilized Tribes. The action was filed in the Federal District Court pursuant to 25 U.S.C. §357, which authorizes the condemnation of lands allotted in severalty to Indians in the same manner as lands owned in fee. Darks and Olivo, although not themselves Indians, were joined in the federal court proceeding because of the nature of their interest in land sought to be condemned. Darks was the owner of a one-half surface interest in 80 acres in tract 1 and the entire surface interest of tract 2. Olivo was the owner of a surface interest in 160 acres of tract 6. The mineral rights in tracts 1, 2, and 6 were owned by Indians.

The Indian defendants in the proceeding were represented by the United States Attorney for the Eastern District of Oklahoma and the defendants Darks and Olivo were represented by private counsel. As provided by law, the District Court appointed Commissioners to determine the value of the condemned property. (Pet. App. B-1, B-12). The Report was completed on October 1, 1973 and Transok, as required by law, paid into the court the total compensation found by the Commissioners on the day the report was filed. All of the defendants objected to the report and demanded a jury trial on the matter of damages.[3] A hearing *de novo* was scheduled.

[3] It should be noted that Darks exercised fully his due process rights filing numerous motions and presenting arguments to the court on various facets of the case. In each and every instance Darks' objections were heard and passed upon by the court. In a nutshell the Petitioners are dissatisfied with the amount of the award.

On August 22, 1975, Transok and the United States, Guardian and the owner of legal title to certain tracts of land for the use and benefit of the named Indians entered a stipulation for judgment. Judgment was entered and the agreed upon amounts of compensation were distributed to the individual defendants. Among the Indians who agreed and accepted the money was Agnes Lucas (now Wesley) who has filed a brief in support of the petition herein.[4]

ARGUMENT

The Petitioners in this case have presented no compelling reasons why this Court should or needs to review the decisionof the Tenth Circuit Court of Appeals. Nowhere in the Petition filed by Darks and Olivo and in the supporting brief of Wesley is the decision of the appellate court expressly challenged. Rather the Petition is for the most part devoted to a restatement of alleged abuses of discretion by the lower court. There is no constitutional question presented for review; there is no conflict with prior Court decisions or the decision of another circuit court; there is no novel interpretation of a federal statute. Despite Petitioners' arguments, the parties in the proceeding were afforded every opportunity to be heard and to present testimony and evidence.

The facts presented in this case do not have broad application and the case by its very nature is limited to the peculiar and particular facts.

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[4] Lucas and three other restricted Indians attempted to set aside the judgment alleging they did not understand the stipulation. However, the Court rejected this contention on August 23, 1976 when it was demonstrated that these defendants had received and accepted the check paid them.

THE DECISION BELOW IS CLEARLY CORRECT

There is no error in the decision of the Tenth Circuit Court of Appeals. In its decision the Court treated carefully each and every issue raised by the petitioners here. The argument of the Petitioners comes down to three contentions (a) that the federal court did not have jurisdiction to hear the case as to non-Indians, (b) the Secretary of the Interior was not made a party to the suit and[5] (c) the District Court abused its discretion in its rulings in the conduct of the case and in its grant of a new trial because of the excessiveness of the jury's award.[6]

The condemnation proceeding was filed in the federal district court pursuant to 25 U.S.C. §357 because the land and mineral interests involved in the gas storage facility were held by the United States for the use and benefit of certain Indians. These Indians were heirs of Allottees, members of the Five Civilized tribes. The land and mineral interests were the subject of restrictions on alienation. Accordingly the federal court and only the federal court could hear the condemnation case as to these particular land and mineral interests. *Town of Okemah v. United States*, 140 F.2d 963 (10th Cir. 1944); See also *McElroy v. Pegg*, 167 F.2d 668 (10th Cir. 1948), *cert. den'd* 333 U.S. 817.

The United States and the named Indian heirs were joined in the proceeding and service upon the United States was made upon the United States Attorney for the Eastern Dis-

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[5] The brief in support of the petition filed by Wesley deals primarily with this point. However, as in the court below, no statutory or case support is offered.

[6] The Petitioners Darks and Olivo contend that the District Court rather than ruling on plaintiff's motion for new trial should have directed *sua sponte* a remittitur.

trict of Oklahoma. Section 357 does not require that the Secretary of the Interior be joined as party, nor does the statute require that the Secretary's approval be obtained to any transfer. The "indispensable party" to any such condemnation proceeding is the United States, not the Secretary of the Interior. *Nicodemus v. Washington Water Power Company*, 264 F.2d 614 (9th Cir. 1954); See also *State of Minnesota v. United States* 305 U.S. 382.[7] There is and cannot be any contention that the United States was not properly joined or that the restricted Indians were inadequately represented.[8]

Darks and Olivo were joined in the federal court proceeding because their interest in the land was commingled with that of the restricted Indians and the plaintiff sought to have all claims and interests in the same tracts adjudicated in a single proceeding. Pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. *Massachusetts Universalist Convention v. Rogers Co.* 183 F.2d 497 (1st Cir. 1950) and its justification lies in the considerations of judicial economy, convenience and fairness to litigants. The plaintiff wherever possible should have his whole case tried at one time. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 320.

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[7] As the Court of Appeals noted in its decision below "one statement [dicta] in *Oklahoma Gas* is not authority for the proposition that the Secretary is indispensable." (Pet. App. B-85) (parenthetical language supplied.)

[8] Wesley in her petition asserts that the Secretary and the BIA did not approve the settlement of the claims of the restricted Indians. However, no authority is cited to support the proposition that approval is required. Indeed in this case, Wesley agreed to the settlement and accepted the check offered in payment for her interest.

This Court's decision in *United Mineworkers v. Gibbs*, 383 U.S. 715 (1966) establishes the guidelines for the exercise of pendent jurisdiction. The courts below correctly applied these guidelines to determine that Darks and Olivo were properly joined. As *Gibbs, supra*, makes clear in order for pendent jurisdiction to exist the federal claims must have substance sufficient to confer subject matter jurisdiction on the court and the federal and state causes must derive from a common nucleus of operative fact, which if, considered without regard to their federal or state character a plaintiff would ordinarily be expected to try them in one judicial proceeding. Id. at 725. Once having acquired jurisdiction as a consequence of the federal issues, "there is power in the federal courts to hear the whole." Id. at 725.

In the case here presented, the very nature of the petitioners' land interests were so commingled with those of the other defendants, there is no question that the cause of action stems from the same nucleus of operative facts. In such circumstances the *Gibbs* doctrine, as the Court of Appeals pointed out, has been appropriately extended to cases involving state claims against defendants over whom there is no independent basis for federal jurisdictions, citing *Curtis v. Everette*, 489 F.2d 516 (2nd Cir. 1973), *cert. den'd.* 416 U.S. 996; *Almenares v. Wyman*, 453 F.2d 10 (2nd Cir. 1971) *cert. den'd* 405 U.S. 944; *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2nd Cir. 1971).

The settlement of the federal issues i.e. the compensation to the restricted Indian defendants did not moot the assertion of pendent jurisdiction. As this Court has noted "mootness . . . . may not occur until after substantial time and energy have been expended looking toward resolution of a dispute that the plaintiffs were entitled to bring in a federal court." *Rosado v. Wyman*, 397 U.S. 397, 404 (1970). It will be remembered in that case, this Court ruled mootness

as to the federal question did not deprive the federal court of power to hear pendent state claims. See *Hagans v. Lavine*, 405 U.S. 528 (1974).[9] As the court below correctly noted the federal issues which gave the court jurisdiction initially were substantial i.e. exclusive jurisdiction over the subject matter, and substantial time and energy had been expended by all parties. Compare *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973). This case has been in litigation since July 1973 as the lower court stated, after four years, countless motions, two jury trials, "it would be a shocking waste of time and money now to require this cause to be relitigated in state court." (Pet. App. B.91).

The lower court did not abuse its discretion in its evidentiary rulings or in its granting of the motion for new trial because of excessiveness of the verdicts. *Holmes v. Wack*, 464 F.2d 86 (10th Cir. 1972); See also *Harris v. Quinones*, 507 F.2d 533 (10th Cir. 1977). To be sure, it is not the purpose of a petition for certiorari to correct individual abuses in the exercise of discretion, as stated in *Magnum Co. v. Coty*, 262 U.S. 159, 163,

> "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. . . ."

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9 *State of Arizona v. Cook Paint & Varnish Co.*, 541 F.2d 226 (9th Cir. 1976), *cert. den'd*, 97 S.Ct. 1327 (1977); *Klaus v. Hi-Shear Corp.*, 528 F.2d 225 (9th Cir. 1975); *Kavit v. A.L. Stamm & Co.*, 491 F.2d 1176 (2d Cir. 1974); *Brunswick v. Regent*, 463 F.2d 1205 (5th Cir. 1972); 3A Moore's Federal Practice, ¶18.07 [1.-3] & n. 41.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Petitioners Dark and Olivo contend that the entire condemnation procedure in Oklahoma is a violation of due process and equal protection guaranteed by the state and federal constitutions because the condemnor is entitled to possession of the property while the issue of damages is litigated.[10] (Pet. 31-37). Notwithstanding Petitioners' emotional tirade, the Oklahoma statutes providing for and establishing condemnation proceedings do not violate procedural or substantive due process standards.[11] Under Oklahoma law the Transok Pipe Line Company has the power of eminent domain and in the exercise of that power it followed the procedures established by the Oklahoma legislature. The Only issue in this case is and has been the measure of damages. On this matter the petitioners presented their evidence and the jury awarded damages.

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10 Under the state procedures, as in this case, if the land owner is not satisfied with the award, he may seek a jury trial and a *de novo* hearing at which any report by the Commissioners is deemed incompetent. In response to the same accusation, the District Court stated "The Oklahoma condemnation procedure is not unconstitutional but affords due process of law and equal protection of the laws in all respects." (Pet. App. B-20).

11 Petitioners cite several cases allegedly supportive of their position *Fuentes v. Shevin*, 407 U.S. 67, (replevin), *North Georgia Finishing Inc. v. Di-Chem, Inc.* 419 U.S. 601; (garnishment). The Oklahoma condemnation procedure is not a summary proceeding. Condemnation may occur only after there is a hearing to justify the taking and define the property to be taken at which all interested parties are entitled to participate. The next step in the two-step process is the measure of compensation for the taking.

No amount of rhetoric, no amount of bootstrapping can enlarge this case beyond its narrow parameters.[12] There is no substantive federal question presented.

THERE IS NO CONFLICT WITH DECISIONS OF OTHER COURTS

The decisions of the lower courts and the court of appeals are not in conflict with the decision of this Court or any other Circuit. Neither the lower court nor the court of appeals engaged in any novel interpretation of law. Indeed the petitioner has cited no cases or statutes to sustain their position.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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[12] Petitioners contend restrictions on the alienation of Indian lands have been eliminated by the passage of time. (Pet. p. 37) Such restrictions have been imposed by Congress in its plenary exercise of jurisdiction.

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No. 77-1062

In the Supreme Court of the United States

OCTOBER TERM, 1977

MAXWELL DARKS AND MARVIN OLIVO, PETITIONERS

v.

TRANSOK PIPELINE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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MAXWELL DARKS AND MARVIN OLIVO, PETITIONERS

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TRANSOK PIPELINE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

The United States will discuss the following question:

Whether the Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. 357, gives the United States district courts jurisdiction over condemnation proceedings brought under state law against allotted lands of the Five Civilized Tribes of Oklahoma held subject to restrictions on alienation, where such allotments are held by restricted heirs and devisees of the original allottees.[1]

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[1]The United States was originally named a party defendant in this condemnation action brought by Transok Pipeline Company. The United States stipulated to a consent judgment of just compensation on behalf of the restricted Indian land-owners, and the United States was thereafter a party in the court of appeals to the appeal by one of those restricted Indians, Agnes Lucas, now Wesley, from the district

STATEMENT

Respondent, Transok Pipeline Company, obtained an order from the Oklahoma Corporation Commission permitting the company to condemn an easement to an underground formation for the storage of natural gas. Respondent then commenced this action in the United States District Court for the Eastern District of Oklahoma, seeking to condemn an easement in approximately 720 acres of allotted lands in Hughes County, Oklahoma, and naming as parties defendant all owners of interests in the lands, as well as the United States. Respondent alleged that federal jurisdiction over the case was conferred by 25 U.S.C. 357[2] because a number of the

court's denial of her motion to set aside the consent judgment. See note 3, *infra*. That appeal was consolidated in the court of appeals with the appeal by non-Indians Darks and Olivo, to which the United States was not a party.

Agnes Lucas, now Wesley, has not filed a petition for certiorari in this Court, but has filed a brief in support of the petition filed by Darks and Olivo. Inasmuch as the judgment is not final with regard to the United States and all the restricted Indian owners, including Wesley, the United States has no direct interest in the outcome of this petition. However, to the extent that petitioners challenge the statutory jurisdiction of the federal court over the condemnation proceedings, the United States is interested in the proper resolution of that issue. Since the United States was a party to the consolidated proceeding in the court of appeals, it would appear that the United States is a party here by virtue of this Court's Rule 21(4). If that is not the case, however, the United States requests that this Memorandum be considered as a Memorandum for the United States as Amicus Curiae.

[2]That statute provides:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

interests in the condemned tracts were held by restricted heirs of Creek Indian allottees. Pendent jurisdiction was asserted over the non-Indians, including petitioners, who held interests in the condemned tracts (Pet. App. B-82).

Pursuant to Oklahoma law, the district court appointed commissioners to assess just compensation for the interests taken (Pet. App. B-12). After the commissioners' report was filed, the United States, on behalf of the restricted Indian owners, stipulated to just compensation in approximately the amounts awarded by the commissioners (Pet. App. B-58, B-82). The district court granted judgment and entered an order of distribution for the restricted defendants (Pet. App. B-56).[3]

Petitioners, Maxwell Darks and Marvin Olivo, who are not Indians and whose interests in the condemned land were unrestricted, demanded and received a jury trial on the issue of just compensation for their interests. After one award had been set aside and a new trial ordered (Pet. App. B-83 to B-84), petitioners were awarded lower

[3]After the final judgment was rendered in the district court, four restricted owners retained private counsel and filed a motion to set aside the consent judgment of just compensation. The motion alleged that the district court lacked jurisdiction because (1) the Secretary of the Interior was not made a party, (2) the United States Attorney was not authorized to represent the restricted defendants, (3) condemnation of an underground interest in allotted land is not permitted by the federal statutes, and (4) the order of the Oklahoma Corporation Commission was not approved by the Secretary of the Interior before condemnation proceedings were commenced. See Brief of Agnes Lucas, now Wesley, in Support of Petition, B-8 to B-9. The district court denied the motion (*ibid.*) and one of the restricted Indians, Agnes Lucas, now Wesley, appealed to the Court of Appeals for the Tenth Circuit. The court of appeals affirmed (Pet. App. B-85 to B-87). Agnes Lucas, now Wesley, has not filed a petition for a writ of certiorari; she has filed a brief in support of the present petition filed by unrestricted non-Indians.

compensation at the second trial (Pet. App. B-84). On appeal, they contended that the federal court lacked jurisdiction over the condemnation proceeding and that, in any event, it improperly exercised pendent jurisdiction over the interests of the unrestricted owners; they also raised a number of issues concerning Oklahoma state condemnation law and the procedures followed in the district court.

The court of appeals affirmed. Finding that the district court had exclusive jurisdiction under 25 U.S.C. 357 over the interests of the restricted Indian owners (Pet. App. B-85), the court approved the exercise of pendent jurisdiction over petitioners (Pet. App. B-87 to B-91). Noting that the federal claims were "substantial" (Pet. App. B-90) and that the case had already required four years and two jury trials, the court concluded that "[i]t would be a shocking waste of time and money now to require this cause to be relitigated in the state court" (*id.* at B-91).

Although the petition for a writ of certiorari raises numerous issues, the United States primarily will address one: whether 25 U.S.C. 357 confers jurisdiction on the United States district courts over condemnation proceedings against allotted lands held by restricted Indian heirs of an allottee of the Five Civilized Tribes of Oklahoma. The remaining issues presented by the petition, including the propriety of exercising pendent jurisdiction over petitioners, do not affect the interests of the United States.

DISCUSSION

The decision of the court of appeals is correct and does not warrant further review.

The Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. 357, provides that lands allotted in severalty to Indians may be condemned for any public purpose under state law.[4]

[4]See note 2, *supra*.

Although the statute itself does not specify the courts in which the condemnation suits may be brought, this Court in *Minnesota* v. *United States*, 305 U.S. 382, made it clear that the jurisdiction of federal courts over Section 357 suits is exclusive. Holding that "[t]he United States is an indispensable party defendant to the condemnation proceedings" (*id.* at 386), the Court stated: "There are persuasive reasons why [Section 357] should not be construed as authorizing suit in a state court. It relates to Indian lands under trust allotments—a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts" (*id.* at 389; footnote omitted). The Tenth Circuit, following this decision, has recognized that federal courts have exclusive jurisdiction over condemnation proceedings against lands allotted to members of the Five Civilized Tribes of Oklahoma. *Town of Okemah, Okl.* v. *United States*, 140 F. 2d 963.

Those decisions are controlling here. Although petitioners suggest (Pet. 5, 12, 37) that federal jurisdiction is exclusive only with regard to original allottees, and not with regard to heirs and devisees holding subject to restrictions on alienation, that contention is unsupported and makes little sense. "A proceeding against property in which the United States has an interest is a suit against the United States," *Minnesota* v. *United States, supra*, 305 U.S. at 386, and the United States is an indispensable party to such suits whether it holds the fee in trust for Indian allottees or has issued a patent subject to continuing restrictions on alienation. See *id.* at 386 n. 1. The interest of the United States does not diminish or terminate because the beneficiary of its protection is not the original allottee but an heir or devisee. Thus, as the court of appeals held (Pet. App. B-87), the district court

in this case properly exercised jurisdiction over the proceedings involving restricted heirs and devisees of original allottees.[5]

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[5]The brief of Agnes Lucas, now Wesley, in support of the present petition raises issues subsidiary to the jurisdictional issue raised in the petition. The Act of April 12, 1926, 44 Stat. 239, as amended, Act of August 4, 1947, 61 Stat. 732, provides special procedures for suits in Oklahoma state courts involving title to lands allotted to members of the Five Civilized Tribes. These procedures include service of notice on an official of the United States Department of the Interior and representation of restricted Indians by attorneys employed by the Department of the Interior. This condemnation proceeding, however, was properly brought pursuant to 25 U.S.C. 357, not under the provisions of the Act of April 12, 1926. See *Town of Okemah, Okl.* v. *United States, supra,* 140 F. 2d at 965-966. The United States, not the Secretary of the Interior, was an indispensable party, and was properly served. Attorneys employed by the Department of the Interior are not authorized to represent the United States or restricted Indians in proceedings brought pursuant to 25 U.S.C. 357. The Department of Justice has that responsibility. 28 U.S.C. 516; 25 U.S.C. 175.

Wesley also asserts that the Act of May 27, 1908, 35 Stat. 312, permitting condemnation of easements "over" lands allotted in severalty, carries with it a negative pregnant that prevents condemnation of an underground formation in allotted lands. There is no basis for this construction, which would produce what the court of appeals called a "ridiculous result" (Pet. App. B-87). Use of the term "over" represents only a shorthand description of the most common easements; it provides no implication to bar condemnation of an interest in land otherwise permitted by 25 U.S.C. 357.

Finally, relying on the language of Section 11 of the Act of August 4, 1947, 61 Stat. 734, Wesley claims the condemnation proceeding were void *ab initio* because the order of the Oklahoma Corporation Commission was not approved by the Secretary of the Interior. Section 11 requires that orders of the Corporation Commission, issued pursuant to the Oklahoma oil and gas conservation laws, 52 Okla. Stat. 81-287, be approved by the Secretary of the Interior to become effective over allotted land. The order of the Corporation Commission permitting condemnation in this case was not issued pursuant to the oil and gas conservation laws, and the court of appeals correctly found the statute inapplicable (Pet. App. B-86). Further review of this minor point of Oklahoma Indian law is not needed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAXWELL DARKS and MARVIN OLIVO,
Petitioners.

VERSUS

TRANSOK PIPE LINE COMPANY,
An Oklahoma Corporation,
Respondent.

BRIEF OF AGNES LUCAS, NOW WESLEY, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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February, 1978

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In the
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1062

MAXWELL DARKS and MARVIN OLIVO,
Petitioners,

VERSUS

TRANSOK PIPE LINE COMPANY,
An Oklahoma Corporation,
Respondent.

BRIEF OF AGNES LUCAS, NOW WESLEY, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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ORDER FROM CORPORATION COMMISSION OF OKLAHOMA

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1. Order No. 96,291, dated March 5, 1973, by the Corporation Commission of Oklahoma in Case No. 35,868 ..... C-1

STATUTORY PROVISION CONFERRING JURISDICTION ON APPEAL

The Final Order of the United States Court of Appeals, Tenth Circuit, was entered on November 14, 1977, with order denying rehearing on December 12, 1977. (App. B, p.'s B-10 and B-23)

The Petition seeking Certiorari was filed within 90 days from the last date invoking this Court's jurisdiction under 62 Stat. 928, 28 U.S.C. § 1254(1).

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SUBSTANTIAL FEDERAL QUESTIONS

The following substantial federal questions are presented in this Brief in Support of Petition for Writ of Certiorari requiring plenary consideration, to-wit:

(1) The Order of March 5, 1973, No. 96,291 from the Corporation Commission of Oklahoma in Case No. 35,868, required to be attached to the Complaint filed herein under 52 O.S. § 36.5 is void as to the Petitioners because of Respondent's failure to comply with Sec. 11, 61 Stat. 732, Act of August 4, 1947.

If the Order of March 5, 1973, No. 96,291 is not void on its face, the United States District Court did not have jurisdiction to hear this proceedings under 31 Stat. 1084 (25 U.S.C. § 357) because there is not a single Indian Allottee owning any interest in Tracts 1 and 2 with this restricted Indian heir of an Allottee, as required by this statute in order to establish jurisdiction.

(2) Respondent Transok Pipe Line Company did not make the Secretary of Interior, Legal Guardian of the restricted Indians—an indispensable party—a party defendant in this action nor serve him with summons or notice as required by Federal Rule 4(d)(5).

(3) The United States District Attorney for the Eastern District of Oklahoma is not the authorized Attorney to represent restricted Indian heirs who are members of The Five Civilized Tribes in condemnation actions in the state or federal courts.

(4) Eminent Domain for an underground gas storage warehouse is not permitted on the land of restricted mem-

bers of The Five Civilized Tribes under paragraph I, Act of May 27, 1908, 35 Stat. 312.

Said proceedings invalid by reason of repugnancy to due process and equal protection of the law under Art. 2, § 7 and § 24, Constitution of Oklahoma, and Amendments V and XIV, Sec. 1, Constitution of the United States, and said rulings further constituting denial of other federal rights.

STATEMENT OF THE CASE

The Petition for Writ of Certiorari seeks review of Judgment and Order of the United States Court of Appeals, Tenth Circuit, of November 14, 1977, with Rehearing denied on December 12, 1977.

This type of condemnation proceedings is authorized under 52 O.S. §§ 36.1-36.7 and 66 O.S. §§ 51-55. Jurisdiction for this state condemnation action in the Federal District Court is said to be 31 Stat. 1084, 25 U.S.C. § 357.

(1) *Lack of Jurisdiction*

Corporation Commission Proceedings

On October 25, 1972, Respondent Transok Pipe Line Company filed Case No. 35,868 before the Corporation Commission of Oklahoma seeking to obtain an order and certificate that an area consisting of approximately 3,660 acres of real property was suitable for the underground storage of natural gas in the "Channel Booch Formation" situated in the matrix of the land approximately -2.500 feet below the surface in Hughes County, Oklahoma.

Respondent Wesley owns an undivided ½ of the fee in Tract 1 (undivided 40 acres) except as to the oil and gas minerals in which she only owns an undivided ⅓ interest. Petitioner also owns ⅓ of the oil and gas in Tract 2. (App. B, pp. 5, 6)

A certificate and Finding is required by 52 O.S. § 36.4 that (a) the underground stratum or formation sought to be acquired is suitable for the underground storage of natural gas and that its use for such purposes is in the public interest and (b) for a determination of the amount of recoverable oil and native gas, if any remaining therein.

Respondent Wesley offers no evidence as to what happened at this hearing inasmuch as her legal guardian, the Secretary of Interior, was not served with notice of this proceedings, nor did he approve this proceedings in behalf of restricted members of The Five Civilized Tribes as required by Section 11, Act of August 4, 1947, 61 Stat. 732.

Therefore, Order No. 96,291 from Corporation Commission Case No. 35,868, which was attached to the Complaint in this condemnation action as required by 52 O.S. § 36.5 is void for failure to comply with Sec. 11, 61 Stat. 732.

The Secretary of Interior, or his representative, thereafter refused to approve this proceedings after negotiations broke down between Respondent and representatives of the Secretary of Interior to execute a long-term lease for gas storage rights under 25 U.S.C. § 415. (App. A, p. 2; App. D, p. 2)

District Court Action

The Respondent, Transok Pipe Line Company, filed a Complaint in the Federal District Court with Oklahoma Corporation Commission Order No. 96,291 attached to the Complaint alleging condemnation jurisdiction under 25 U.S.C. § 357. (App. Ct. App., Vol. I, p. 1)

The Respondent, Transok Pipe Line Company, does not allege that any of the defendants below are the original allottees but does allege that some defendants below are restricted Indians (Members of The Five Civilized Tribes) while other defendants are non-restricted co-tenants in ownership of the land being condemned. Since none of the defendants below are allottees in Tract 1, or Tract 2, the District Court does not have jurisdiction in this matter.

(2) ***Secretary of Interior, Guardian of restricted Indians and an indispensable Party, was not served with summons or notice of this proceedings.***

In the Complaint filed in the District Court, Respondent Transok Pipe Line Company failed to name the Secretary of Interior, Guardian of restricted Indians, as a party to the action. Nor was summons or notice of the proceedings in the District Court served upon him as required by Rule 4(d)(5), Federal Rules of Civil Procedure, or as required by Sec. 6, Act of May 27, 1908, 35 Stat. 312 and Sec. 4, Act of August 4, 1947, 61 Stat. 732. (App. A, p.'s 4 and 10)

The Respondent, Transok Pipe Line Company merely served (1) the individual restricted wards, (2) non-restricted co-defendants, and (3) The United States of America, by serving the United States Attorney for the Eastern

District of Oklahoma, as a matter affecting title to certain Indian lands previously allotted in fee with certain restraints on alienation and presently restricted under the law as to the present owners of said lands.

Respondent Transok Pipe Line Company failed to serve the legal guardian of the restricted Indians herein, the Secretary of Interior. As guardian of restricted Indians, the Secretary of Interior is an indispensable party to the litigation in behalf of their wards.

(3) ***United States Attorney for the Eastern District of Oklahoma is not authorized to represent the restricted Indian heirs of the original Allottees of The Five Civilized Tribes.***

When this condemnation action was filed, the United States Attorney for the Eastern District of Oklahoma interceded in the negotiations between Respondent and attorneys representing the Secretary of the Interior who had been attempting to secure a long-term gas storage contract in behalf of the Indian land owners authorized under 25 U.S.C. § 415. (App. A, p. 2; App. D, p. 1)

The United States Attorney's Office accepted a settlement in behalf of the restricted Indians based on the appraised value by the commissioners appointed under Art. 2, § 24, Constitution of Oklahoma, and 66 O.S. § 53. This settlement completed on August 22, 1975, when Judge Joseph W. Morris entered Judgment and Order. (App. B, p. 1) Respondent Wesley received $2,543.86 for her fee interest in Tract 1 and $543.86 for the oil and gas minerals in Tract 2.

It is herewith noted that the settlement on August 22, 1975, (App. B, p.'s 5 & 6) constituted approximately 1½% of

the actual value of Respondent Wesley's interest in the underground warehouse under Tract 1 on the date of taking. According to the offer of proof by a petroleum engineer, at the jury trials, Respondent Wesley's interest (the same as Defendant Maxwell Darks' interest) had a fair market value between a willing seller and a willing buyer on October 1, 1973, of $200,920.00. (App. Ct. App., Vol. II, p. 340)

There is nothing in the record of this case to reflect that this settlement of August 22, 1975, was approved by the Secretary of Interior or showing that the Bureau of Indian Affairs in Muskogee, Oklahoma (an agency under the Secretary of Interior), agreed to this settlement. Nor is there any authority under the law to demonstrate that the United States Attorney for the Eastern District of Oklahoma has any authority to usurp the duties of the Secretary of Interior as Guardian of the restricted Indians in this condemnation action. This judgment is therefore void.

(4) *The taking of a subsurface strata or formation such as described in 52 O.S. § 36.3(c) is not permitted by law.*

Paragraph 1, Act of May 27, 1908, 35 Stat. 312, does not allow eminent domain in connection with an underground gas storage warehouse in restricted Indian land belonging to members of The Five Civilized Tribes. Under the above law, eminent domain can be had in connection with Indian land for right-of-way purposes only. Therefore, this action must fail from a substantive standpoint.

Because of the foregoing this judgment is void.

On August 23, 1976, Respondent Wesley filed a Motion to Set Aside the Judgment and Order of Distribution of

August 22, 1975, alleging that the United States District Attorney did not have authority to represent the restricted Indians. It was further alleged therein that the Court did not have jurisdiction of the restricted Indian heirs under 25 U.S.C. § 357 and that § 1, Act of May 27, 1908, 35 Stat. 312, did not permit condemnation of an underground gas storage warehouse. The Motion was overruled in the Order of the District Court filed on September 7, 1976. (App. B, p. B-8)

Appeal to the United States Court of Appeals Tenth Circuit resulted in the Order of November 14, 1977. (App. B, p. B-10)

Petitioners Darks and Olivo thereafter filed Petition for Writ of Certiorari and Respondent Wesley files this Brief in Support of the Petition filed herein.

ARGUMENT

Since the early discovery of oil and gas in the late 1920's, on allotments of members of The Five Civilized Tribes, there has been a controversy with conflict between the United States Attorney for the Eastern District of Oklahoma and attorneys representing the Bureau of Indian Affairs (an agency under the Secretary of Interior). This controversy involves a power struggle as to who will have the last say on what is best for the restricted Indians.

Mr. W. F. Semple is recognized as an authority in this field of law. In his book "Oklahoma Indian Land Titles," published by Thomas Law Book Co., he devotes Chapter XXI to a discussion of jurisdiction as it pertains to state

and federal courts. The Act of April 26, 1926, 44 Stat. 239, pertains to cases which were actually filed against restricted Indians *in the state courts* of Oklahoma. This Act afforded the federal government an option to remove the litigation to its own court as pointed out in § 382 on page 288.

Section 383, page 288 therein states the following:

> "It will be noted that Section 3 of the Act of 1926 provides a type of procedure for the transfer of causes to the federal court that is independent of the general statutes relating to removals to the federal courts on account of diversity of citizenship or other jurisdictional grounds. In the removal to the federal court under this special Act of Congress, the amount in controversy is not of any consequence. The test is, Does the action involve a restricted Indian or the rents, profits or income from a restricted tract of land?"

Obviously, this statute has no bearing on this lawsuit which is an original action instituted under a separate statute, namely 31 Stat. 1084, 25 U.S.C. § 357.

In Chapter XXIII, § 468, p. 338 of Mr. Semple's book, the title and opening sentence in this section is as follows:

> "Condemnation Proceedings Against Restricted Allottees.—The only court which has jurisdiction in condemnation proceedings against restricted Indian *allottees* is the United States court. . . ." (Emphasis ours)

In drafting Section 3, Act of April 26, 1926, Congress failed to note a discrepancy which failed to specifically name the Secretary of Interior, or his representative, to represent restricted Indians when the case was removed from the state court, and make the decision as to whether

actions actually filed in the state courts against restricted members of The Five Civilized Tribes should be removed to the federal courts—in the best interest of the Indians. This error was corrected in Sec. 3(c) of the Act of August 4, 1947, 61 Stat. 732.

In § 405, page 299, Mr. Semple states the following:

> "§ 405. Removals to the Federal Court Under the Act of April 12, 1926 are now Under the Control of the Secretary of the Interior and Not the Attorney General.—By Section 3 (c) of the Act of August 4, 1947 the Secretary of the Interior alone is clothed with power to determine when causes are to be transferred to the federal court under the Act of April 12, 1926. Prior to the 1947 Act and under the provisions of Section 3 of the Act of 1926 causes were removed at the instance of the Attorney General, without reference to the concurrence or approval of the Secretary of the Interior. The purpose of this amendment inserted in the Act of 1947 was to empower the Secretary of the Interior, as the official having immediate charge of all matters relative to restricted Indians, to decide whether or not a case should be transferred to the federal court, *whereas theretofore the two departments were sometimes in conflict and occasionally did not agree upon the question as to the advisability of removing the cause.*" (Emphasis ours)

In Town of *Okemah* v. *United States* (10th Cir. 1944), 140 F.2d 963, the facts reflected therein show that the Town of Okemah filed a condemnation action against restricted *Allottees* in the state court. The United States Attorney removed the case to the United States District Court under his authority to do so under the Act of April 12, 1926, 44 Stat. 82. The federal court then dismissed the case because

25 U.S.C. § 357 requires that condemnation be filed as an original action against *Allottees* in the federal court.

The Act of August 4, 1947, 61 Stat. 732, transferred legal representation in removal cases from the state court from the United States Attorney to attorneys representing the Secretary of Interior, Guardian of the restricted Indians.

It is herewith noted that Respondent Transok Pipe Line Company negotiated with attorneys and the Oil and Gas Geological Department of the Bureau of Indian Affairs attempting to obtain a long-term storage lease commencing in 1971 (App. D, p. 1). When they could not obtain a long-term storage agreement "on their terms" they simply filed suit against the restricted Indian heirs of Allottees in the Federal District Court and made the United States of America, a co-defendant. They failed to name the Secretary of Interior a party defendant and also failed to serve him as required under Rule 4(d)(5), Federal Rules of Civil Procedure. Since the Secretary of Interior is Guardian of the restricted Indians he is an indispensable party to the proceedings as pointed out in *United States* v. *Oklahoma Gas and Electric Co.*, 127 F.2d 349, *aff'd* 318 U.S. 206, 63 S.Ct. 534, 87 L.Ed.2d 716 (1936).

The authority for the United States District Attorney to act as attorney for the restricted Indians in this case is not disclosed either in the record of this case or under 31 Stat. 1084. The Indians have not signed any waiver allowing such representation in the record of this case. Under Oklahoma law set out in *Pettis* v. *Johnson*, 78 Okl. 277, 190 Pac. 681 (1920), such representation is subject to direct or collateral attack.

Martinez v. *Southern Ute Tribe of Indians*, 249 F.2d 915 (1957), held that the Federal Courts are courts of limited jurisdiction and can take cognizance of only those matters which Congress has entrusted to them by statute. The case also states that in the absence of statute they have no jurisdiction merely because an Indian is a ward of the government. Although the *Martinez* case was a case wherein the government sought to sue for the restricted Indians, the converse is also true when restricted Indians are made defendants in a diametrically opposite situation.

Further, Paragraph 1, Act of May 27, 1908, 35 Stat. 312, is very clear that the only type of condemnation that will be allowed on lands of restricted members of The Five Civilized Tribes will be for "right-of-way" only. 52 O.S. §36.3(c) describes a taking of a fee interest in the matrix below the surface and is not a right-of-way but an underground gas storage warehouse.

Cases believed to sustain this Court's jurisdiction are:

—*United States* v. *Oklahoma Gas and Electric Co.*, 127 F.2d 349, *aff'd* 318 U.S. 206, 63 S.Ct. 534, 87 L.Ed. 716 (1936);

Fuentes v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972);

North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

CONCLUSION

Respondent Wesley respectfully requests that this case be remanded to District Court with instructions to dismiss because of lack of jurisdiction as to this Respondent and the Petitioners herein because of lack of jurisdiction to condemn an underground gas storage warehouse on restricted Indian land.

Respectfully submitted,

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Attorney for Respondent,
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February, 1978

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Brief in Support of Petition for Writ of Certiorari were mailed on this ..... day of February, 1978, first class postage fully prepaid, to:

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APPENDIX A

(1) U.S. CONST., amend. V, Due Process Clause [U.S.C.A. Const. Amend. V, p. 4]

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2) U.S. CONST., amend. XIV, Sec. 1 [U.S.C.A. Const. Amendments 13 to 14, p. 33]

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

25 U.S.C. INDIANS

(3) 31 Stat. 1084 (25 U.S.C. § 357), [25 U.S.C.A., p 426]

§ 357 Condemnation of lands under laws of States

Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Mar. 3. 1901. c. 832, § 3, 31 Stat. 1084.

(4) 25 U.S.C.A, p 103 pocket part

§ 415. Leases of restricted lands for public, religious, educational, recreational, residential, business, and other purposes; approval by Secretary

(a) Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land located outside the boundaries of Indian reservations in the State of New Mexico, and leases of land on the Agua Caliente (Palm Springs) Reservation, the Dania Reservation, the Swinomish Indian Reservation, the Southern Ute Reservation, the Fort Mojave Reservation, the Burns Paiute Reservation, the Coeur d'Alene Indian Reservation, the Kalispel Indian Reservation, the pueblo of Cochiti, the pueblo of Pojoaque, the pueblo of Tesuque, the pueblo of Zuni, the Hualapai Reservation, the Spokane Reservation, the San Carlos Apache Reservation, Yavapai-Prescott Community Reservation, the Pyramid Lake Reservation, the Gila River Reservation, the Soboba Indian Reservation, the Tulalip Indian Reservation, and the Navajo Reservation which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

(b) Any lease by the Tulalip Tribes under subsection (a) of this section, except a lease for the exploitation of any natural resource, shall not require the approval of the Secretary of the Interior (1) if the term of the lease does not exceed fifteen years, with no option to renew, or (2) if the term of the lease does not exceed thirty years, with no option to renew, and the lease is executed pursuant to tribal regulations previously approved by the Secretary of the Interior.

As amended Nov. 4, 1963, Pub.L. 88—167, 77 Stat. 301; Apr. 27, 1966, Pub.L. 89—408, 80 Stat. 132; Dec. 8, 1967, Pub.L. 90—182, 81 Stat. 559; Dec. 10, 1967, Pub.L. 90—184, 81 Stat. 560; June 10, 1968, Pub.L. 90—335, § 1(f), 82 Stat. 175; June 20, 1968, Pub.L. 90—355, 82 Stat. 242; Sept. 28, 1968, Pub.L. 90—534, § 6, 82 Stat. 884; Oct. 12, 1968, Pub.L. 90—570, 82 Stat. 1003; June 2, 1970, Pub.L. 91—274, §§ 2, 3, 84 Stat. 302; June 2, 1970, Pub.L. 91—275, §§ 1, 2, 84 Stat. 303; Dec. 17, 1970, Pub.L. 91—557, § 8, 84 Stat. 1468; Dec. 15, 1971, Pub.L. 92—182, § 6, 85 Stat. 626; Sept. 26, 1972, Pub.L. 92—431, 86 Stat. 723; Oct. 9, 1972, Pub.L. 92—472, § 7, 86 Stat. 788; Oct. 13, 1972, Pub.L. 92—488, § 4, 86 Stat. 806.

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(5) ACT OF MAY 27, 1908.

35 Stat. 312

An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes.

Classification of restricted allottees.

Secretary may remove restrictions.

Right of eminent domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters

Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

* * * * * *

Authority conferred on the county courts as to minors, etc.

§ 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regu-

lations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of said minors. The probate courts may, in their discretion, appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

Representatives of the Secretary to represent restricted allottees.

And said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them

in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

* * * * * *

Procedure on sale of inherited land.
Children born since Mar. 4, 1906.
Acknowledgment of wills.

§ 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hun-

dred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided further, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

* * * * * *

(6) ACT OF APRIL 12, 1926

44 Stat. 239

An Act To amend section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), and for putting in force, in reference to suits involving Indian titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes.

* * * * * *

Procedure applicable on transfer to federal court.
State court to proceed no further.

Sec. 3. Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty

days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Superintendent for the Five Civilized Tribes or, in the case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action or his or her counsel of record and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if return of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had and in no event shall the United States be bound unless written notice is had as herein specified: Provided, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court

of the United States within twenty days after the filing of the petition for removal and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.

Approved, April 12, 1926

44 Stat. 239

* * * * * *

(7) ACT OF AUGUST 4, 1947

61 Stat. 732

An Act Relative to restrictions applicable to Indians of the Five Civilized Tribes of Oklahoma, and for other purposes.

Half-blood heirs and devisees restricted.

Ten days notice.

Consideration to be recited.

Grantor present unless excused by Probate Attorney.

Not removable to federal court.

Court may approve conditionally.

Probate attorney may appeal.

Sales of minors and incompetents controlled by state laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That all restrictions upon all lands in Oklahoma belonging to members of the Five Civilized Tribes, whether acquired by allotment, inheritance, devise, gift, exchange,

partition, or by purchase with restricted funds, of whatever degree of Indian blood, and whether enrolled or unenrolled, shall be, and are hereby, removed at and upon his or her death: Provided, (a) That except as provided in subdivision (f) of this section, no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated; (b) that petition for approval of conveyance shall be set for hearing not less than ten days from date of filing, and notice of hearing thereon, signed by the county judge, reciting the consideration offered and a description of the land shall be given by publication in at least one issue of a newspaper of general circulation in the county where the land is located and written notice of such hearing shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition is to be heard. The grantor shall be present at said hearing and examined in open court before such conveyance shall be approved, unless the grantor and the probate attorney shall consent in writing that such hearing may be had and such conveyance approved in the absence of the grantor, and the court must be satisfied that the consideration has been paid in full. Proceedings for approval of conveyances by restricted heirs or devisees under this section shall not be removable to the Federal court; (c) the evidence taken at the hearing shall be transcribed and filed of record in the case, the expense of which, including attorney fees and court costs, must be borne by the grantee. The court in its discretion, when deemed for the best interest of the Indian, may approve the conveyance conditionally, or may withhold approval; (d) that at said hearing competitive bidding may be had and a conveyance may be confirmed in the name of the person offering the highest bid therefor

or when deemed necessary the court may set the petition for further hearing; (e) that the probate attorney shall have the right to appeal from any order approving conveyances to the district court of the county in which the proceedings are conducted within the time and in the manner provided by the laws of the State of Oklahoma in cases of appeal in probate matters generally, except that no appeal bond shall be required; (f) that sales of the interests of minor and incompetent persons shall be made in conformity with the laws of the State of Oklahoma. Notice of such sale shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition for sale is to be heard; (g) that nothing contained in this section shall be construed to modify or repeal the Act of February 11, 1936 (49 Stat. 1135), relating to leases for farming and grazing purposes.

* * * * * *

Probate attorney to represent restricted members.

§ 4. That the attorneys provided for under the Act of May 27, 1908 (385 Stat. 312), are authorized to appear and represent any restricted member of the Five Civilized Tribes in Oklahoma before any of the courts of the State of Oklahoma in any matter in which the said restricted Indian may have an interest.

* * * * * *

When and how state oil and gas conservation laws apply to restricted land.

§ 11. All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma: Provided, That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative.

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(8) FEDERAL RULES

1975 Edition West Publishing Co., pp. 32 and 33;
Rule 4(d)(5)

(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

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(9) 2 Okl. Stats. 1971 Official Ed., p 3072 [52 O.S.A. § 1, p 31]

52 O.S., GAS COMPANIES AND PIPE LINES
UNDERGROUND STORAGE OF GAS

§ 36.1 Definitions

As used in this Act[1] (a) "underground storage" shall mean storage in a subsurface stratum or formation of the earth; (b) "natural gas" shall mean gas either while in its original state or after the same has been processed by removal therefrom of component parts not essential to its use for light and fuel; (c) "native gas" shall mean gas which has not been previously withdrawn from the earth; (d) "natural gas public utility" shall mean any person, firm or corporation authorized to do business in this State and engaged in the business of transporting or distributing natural gas by means of pipe lines into, within or through this State for ultimate public use; (e) "commission" shall mean the State Corporation Commission.

Laws 1951, p. 134, § 1, eff. May 26, 1951.

(10) 2 Okl. Stats. 1971 Official Ed., p 3073 [52 Okl. St. Ann. § 1, p 32]

§ 36.2 Public interest and welfare

The underground storage of natural gas which promotes conservation thereof, which permits the building of reserves for orderly withdrawal in periods of peak demand, which makes more readily available our natural gas resources to the domestic, commercial and industrial consumers of this State, and which provides a better year-round market to the various gas fields, promotes the public interest and welfare of this State.

Therefore in the manner hereinafter provided the commission may find and determine that the underground storage of natural gas as hereinbefore defined is in the public interest.

Laws 1951, p. 134, § 2, eff. May 26, 1951.

(11) 2 Okl. Stats. 1971 Official Ed., p 3073 [52 Okl. St. Ann. § 1, p 33]

§ 36.3 Condemnation of subsurface stratum or formation—Operation of storage facilities—Limitations

Any natural gas public utility may condemn for its use for the underground storage of natural gas any subsurface stratum or formation in any land which the commission shall have found to be suitable and in the public interest for the underground storage of natural gas, and in connection therewith may condemn such other interests in property as may be required adequately to examine, prepare, maintain and operate such underground natural gas storage facilities; provided, however, that the right of condemnation of underground sands, formations and strata, granted hereby, shall be limited as follows:

(a) No sand, formation, or stratum which is producing or which is capable of producing oil in paying quantities,

through any known recovery method, shall be subject to appropriation hereunder;

(b) No gas bearing sand, formation, or stratum shall be subject to appropriation hereunder, unless the volumes of native gas originally in place therein shall be shown to be substantially depleted, and that such sand, formation or stratum has a greater value or utility as a gas storage reservoir for the purpose of insuring an adequate supply of natural gas for any particular class or group of consumers of natural gas, or for the conservation of natural gas, than for the production of the relatively small volumes of native gas which will remain therein, provided that no gas sand, formation or stratum shall be condemned under the terms of this Act[1] when the gas therein is being used for the secondary recovery of oil, unless gas in necessary and required amounts is furnished to the operator or operators of the secondary recovery operations for as long as oil is produced in paying quantities in the secondary operations for the recovery of oil at the same cost as that at which the gas was being produced at the time of condemnation by the operator of the secondary recovery project or projects.

(c) Only such area of such underground sand, formation or stratum as may reasonably be expected to be penetrated by gas displaced or injected into such underground gas storage reservoir may be appropriated hereunder.

(d) No rights or interest in existing underground gas reservoirs, being used for the injection, storage and withdrawal of natural gas, owned or operated by others than the condemner, shall be subject to appropriation hereunder.

The right of condemnation hereby granted shall be without prejudice to the rights of the owner of said lands or of other rights or interests therein to drill or bore through the underground stratum or formation so appropriated in such manner as shall comply with orders, rules and regulations of the commission issued for the purpose

of protecting underground storage strata or formations against pollution and against the escape of natural gas therefrom and shall be without prejudice to the rights of the owner of said lands or other rights or interests therein as to all other uses thereof. The additional cost of complying with such regulations or orders in order to protect the storage shall be paid by the public utility.

Laws 1951, p. 135, § 3, eff. May 26, 1951.

(12) 2 Okl. Stats. 1971 Official Ed., p 3073 [52 Okl. St. Ann. § 1, p 34]

§ 36.4 Certificate of commission

Any natural gas public utility desiring to exercise the right of eminent domain as to any property for use for underground storage of natural gas shall, as a condition precedent to the filing of its petition in the district court, obtain from the commission a certificate setting out findings of said commission (a) that the underground stratum or formation sought to be acquired is suitable for the underground storage of natural gas and that its use for such purposes is in the public interest; (b) the amount of recoverable oil and native gas, if any, remaining therein; provided, that the commission shall issue no such certificate until after public hearing is had on application, pursuant to notice served in compliance with notice in civil actions in the district court, together with notice published at least once each week for two (2) successive weeks in some newspaper of general circulation in the county or counties where the gas is proposed to be stored, the first publication to be at least ten (10) days prior to the date of the hearing.

Laws 1951, p. 135, § 4, eff. May 26, 1951.

(13) 2 Okl. Stats. 1971 Official Ed., p 3074 [52 Okl. St. Ann. § 1, p 35]

§ 36.5 Petition to district court—Examination and determination—Subsequent proceedings

Any natural gas public utility having first obtained a certificate from the commission as hereinbefore provided, desiring to exercise the right of eminent domain for the purpose of acquiring property for the underground storage of natural gas shall do so in the manner hereinafter provided. Such natural gas public utility shall present to the district court of the county wherein the land is situated, or to the judge thereof, a petition setting forth the purpose for which the said property is sought to be acquired, a description of the property sought to be appropriated and the names of the owners thereof as shown by the records of such county. The petitioner shall file the certificate of the commission as a part of its petition and no order by the court granting said petition shall be entered without such certificate being filed therewith. The court or the judge thereof shall examine said petition and determine whether the petitioner has the power of eminent domain and whether said property is necessary to its lawful purposes, and if found in the affirmative, such finding shall be entered in the record and subsequent proceedings shall follow the procedure now provided by law in the exercise of the rights of eminent domain by railroads.

Laws 1951, p. 136, § 5, eff. May 26, 1951.

(14) 2 Okl. Stats. 1971 Official Ed., p 3074 [52 Okl. St. Ann. § 1, p 36]

§ 36.6 Ownership of gas

All natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities, shall at all times be deemed the property of the injector, his

heirs, successors or assigns; and in no event shall such gas be subject to the right of the owner of the surface of said lands or of any mineral interest therein, under which said gas storage fields, sands, reservoirs, and facilities lie, or of any person other than the injector, his heirs, successors and assigns, to produce, take, reduce to possession, waste, or otherwise interfere with or exercise any control thereover, provided that the injector, his heirs, successors and assigns, shall have no right to gas in any stratum, or portion thereof, which has not been condemned under the provisions of this Act,[1] or otherwise purchased.

Laws 1951, p. 136, § 6, eff. May 26, 1951.

(15) 2 Okl. Stats. 1971 Official Ed., p 3074 [52 Okl. St. Ann. § 1, p 37]

§ 36.7 Partial invalidity

If any section, paragraph, sentence or phrase of this Act[1] shall be declared unconstitutional or void for any reason by any court of final jurisdiction, such decision shall not, in any way, invalidate or affect any other section, paragraph, sentence or phrase of this Act, but the same shall continue in full force and effect.

Laws 1951, p. 136, § 7.

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66 Ok. St. RAILROADS

(16) 3 Okl. Stats. 1971 Official Ed., p 3986 [64 Okl. St. Ann. § 1, p 286]

§ 51 Power to enter upon and appropriate lands

Every railroad corporation incorporated under this Article,[1] and any railroad corporation authorized to construct, operate or maintain a railroad within this State, has power and is authorized to enter upon any land for the purpose of examining and surveying its railroad, and to take, hold and

appropriate so much real estate as may be necessary for the location, construction and convenient use of its road, including all necessary grounds for buildings, stations, workshops, depots, machine-shops, switches, sidetracks, turntables, snow defences and water stations; all material for the construction of such road and its appurtenances, and the right of way over adjacent land sufficient to enable such corporation to construct and repair its road and the right to conduct water to its water stations, and to construct and maintain proper drains, and may obtain the right to such real estate by purchase or condemnation in the manner provided by the law. R.L. 1910, § 1397.

(17) 3 Okl. Stats. 1971 Official Ed., p 3986 [64 Okl. St. Ann. § 1, p 289]

§ 52. Purchasing or taking realty

Any railroad corporation may purchase and use real property for a price to be agreed upon with the owners thereof; or the damages to be paid by such corporation for any real property taken as aforesaid, when not agreed upon, shall be ascertained and determined as hereinafter provided.

R.L. 1910, § 1399.

(18) 3 Okl. Stats. 1971 Official Ed., p 3986

§ 53. Taking by eminent domain—Commissioners—Appointment and proceedings—Right to construct road.—If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this state, may desire to locate its road, shall refuse to grant the right-of-way through and over his premises, the district judge of the county in which said real property may be situated shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, either by personal service or by leaving a copy thereof at his usual place of residence with some member

of his family over fifteen (15) years of age, or, in case of his nonresidence in the state, by such publication in a newspaper as the judge may order, direct the sheriff of said county to summon three disinterested freeholders to be selected by said judge as commissioners, and who must not be interested in a like question. The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of said railroad, and they shall assess the damages which said owner will sustain by such appropriation of his land, irrespective of any benefits from any improvement proposed, and they shall forthwith make report in writing to the clerk of the said court, setting forth the quantity, boundaries, and value of the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk, and a certified copy thereof may be transmitted to the register of deeds of the county where the land lies, to be by him filed and recorded (without further acknowledgment or proof) in the same manner and with like force and effect as is provided for the record of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises. R.L. 1910, § 1400; Laws 1971, c. 33, § 1. Operative Jan. 1, 1972.

(19) 3 Okl. Stats. 1971 Official Ed., p 3988 [64 Okl. St. Ann. § 1, p 312]

§ 54. Compensation, accrual of right to

When possession is taken of property condemned, as provided herein, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice

to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of said compensation. R.L. 1910, § 1401.

(20) 3 Okl. Stats. 1971 Official Ed., p 3988 [64 Okl. St. Ann. § 1, p. 51 pock. part]

§ 55. Review of commissioners' report—Jury trial—Notice

(A) The report of the commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisement on good cause shown; or either party may within sixty (60) days after the filing of such report file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, all costs in the district court may be taxed against him.

(B) Within ten (10) days after the report of commissioners is filed, the court clerk shall forward to the attorney of record for the condemnor, the attorney of record for each condemnee, and to all unrepresented condemnees, a copy of the commissioners' report and a notice stating the time limits for filing an exception or demand for jury trial as specified in paragraph (A) of this Section. This notice shall be on a form prepared by the Court Administrator, which shall be approved by the Supreme Court, and shall be distributed to all clerks of the district court by said Court Administrator. If a party has been served by publication, the clerk shall forward a copy of the report of commissioners and notice of time limits for filing an exception

or demand for jury trial to the last known mailing address, if any, and shall cause a copy of the notice of time limits to be published in one (1) issue of a newspaper qualified to publish legal notices, as defined in 25 O.S. Supp. 1969, § 106. After issuing the notices provided herein, the court clerk shall endorse on the notice form filed in the case, the date and that a copy of the report together with the notice was mailed to each party or his attorney of record, or the date the notice was published in compliance with the provisions hereof.

(C) The time limits for filing an exception and demand for jury trial, as prescribed in paragraph (A) of this Section, shall be calculated from the date the report of the commissioners is filed in the case. On failure of the court clerk to give notice within the time prescribed in paragraph (B) of this Section, the court, on application of any party, may extend the time for filing an exception to the report or a demand for trial by jury for a period not to exceed twenty (20) days from the date the application is heard.

R.L. 1910, § 1402; Laws 1961, p. 497, § 1; Laws 1970, c. 322, § 1, eff. Jan. 1, 1971.

APPENDIX B

FILED
AUG. 22, 1975

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma Corporation, Plaintiff, vs. An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma, AND The United States of America, et al., Defendants.	)	Case No. 73-186 Civil

JOURNAL ENTRY OF JUDGMENT
AND ORDER OF DISTRIBUTION

This matter comes on to be heard on this 22nd day of August, 1975, upon the Stipulation and joint motion of Plaintiff and Defendant, The United States of America, Guardian and owner of the legal title to said land for the use and benefit of certain Restricted Indians, for a judgment, at which time the Plaintiff appeared by its Attorney, Andrew Wilcoxen, and the Defendant, The United States of America, Guardian, appeared by Edwin L. Gage, Assistant

United States Attorney for the Eastern District of Oklahoma, and said parties in open court having agreed that this matter might be heard without further notice, and the Court fully advised in the premises, finds:

1.

This is an action of a civil nature brought by the Plaintiff, Transok Pipe Line Company, an Oklahoma corporation, against the United States of America, Guardian of the legal title to the lands involved in this action, which lands has heretofore been allotted in severalty to certain Restricted Indians who are wards of the United States of America, for the taking and appropriation under the power of eminent domain of an easement and rights over the tract of land hereinafter described, and for the ascertainment and award of just compensation to the owner and parties interested therein. Jurisdiction in this cause arises out of the Act of Congress of May 3, 1901, Chapter 832, Sec. 3, 31 Stat. 1084, 25 USCA Sec. 357, 52 Okl. Stat. Annotated, Sec. 22 and 27, Sec. 36.1 to 36.7, and 66 Okl. Stat. Annotated, Sec. 51 to 60 inclusive. Rule 71A(k) of the Federal Rules of Civil Procedure apply.

2.

Plaintiff is a corporation organized and existing under the laws of the State of Oklahoma, and is engaged, as authorized by its Articles of Incorporation, in the business of transmitting and transporting natural gas for public purposes, and is a Natural Gas Public Utility as defined by 52 Okl. Stat. 36.1 et seq., and that it is necessary for Plaintiff in the furtherance of its public business to acquire certain easements and rights across lands hereinafter described, and Plaintiff is authorized to exercise the right of eminent domain for the purpose of taking and appropriating such easements and rights across said lands for the purposes hereinafter set forth which it has been unable to obtain by private negotiations.

3.

It is necessary for Plaintiff to take and appropriate easements and rights for the construction, operation, maintenance and use of the lands described hereinafter for the purposes of the underground storage of natural gas, including the right to construct pipelines, drill wells, and enter upon said properties in the proper use and operation of such underground natural gas storage fields, together with the right to continue to use certain existing natural gas wells, the leasehold interest in which was acquired by Plaintiff prior to the implementation of its underground natural gas storage project. That Defendant, The United States of America has not filed in this cause any defense or objection to the taking and appropriation of such easements and rights as set forth in Plaintiff's Complaint, and therefore, has waived such defense or objection.

4.

That the Plaintiff and Defendant, The United States of America, Guardian, filed a Stipulation herein agreeing that the evidence which would be presented by each as to the damage and injury arising by reason of the appropriation of the aforesaid easements and rights would be identical as to the amount thereof and, therefore, no issue remains to be presented to a jury.

5.

That the Defendant, United States of America, Guardian, and the Plaintiff, Transok Pipe Line Company, have each filed a Demand for Jury Trial and that said Defendant and Plaintiff have withdrawn such Demands.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff, Transok Pipe Line Company, have and recover judgment against the Defendant, The United States of America, Guardian of the legal title in said lands for the use and benefit of certain Restricted Indians, con-

demning and vesting in Plaintiff a perpetual easement and rights to construct, maintain, use and operate its gas storage facility with all rights necessary thereto as set out in the Complaint herein together with the right to continue to use, maintain, and operate existing pipelines owned by Plaintiff and located upon the following described lands and the right to continue to use, operate and maintain the existing wells from the surface to the base of the Channel Booch formation together with the equipment appurtenant thereto, presently owned by Plaintiff located upon the following described lands, all situated in Hughes County, Oklahoma.

Tract 1: The East Half (E½) of the Southeast Quarter (SE¼) of Section 21, Township 8 North, Range 11 East, containing 80 acres, more or less with respect to one-half the surface interest and all of the mineral interest.

Tract 2: The West Half (W½) of the Southwest Quarter (SW¼) of Section 22, Township 8 North, Range 11 East, containing 80 acres more or less with respect to the mineral interest only.

Tract 3: With respect to the mineral interest only.

Tract 3: The West Half (W½) of the Northeast Quarter (NE¼) of Section 28, Township 8 North, Range 11 East, containing 80 acres more or less, with respect to one-half of the mineral interest only.

Tract 4: The West Half (W½) of the Northeast Quarter (NE¼) of Section 29, Township 8 North, Range 11 East, containing 80 acres more or less, with respect to the mineral interests only.

Tract 5: The Southeast Quarter (SE¼) of Section 30, Township 8 North, Range 11 East, containing 160 acres more or less with respect to the surface and mineral interests in their entirety and upon which a 16-inch pipeline has been constructed and upon which a 4-inch pipeline has been constructed.

Tract 6: The Northeast Quarter (NE¼) of Section 36, Township 8 North, Range 10 East, containing 160 acres more or less, with respect to an undivided 23/24ths of the mineral interest only.

Tract 7: The North Half (N½) of the Northwest Quarter (NW¼) (Lots 3 and 4) of Section 1, Township 7 North, Range 10 East, containing 78.89 acres more or less, with respect to the surface and mineral interests in their entireties.

Which easements and rights shall include the right, privilege and authority of ingress and egress to said properties for the purposes of operating, maintaining, repairing and removing pipelines and other facilities necessary and incident to the use of said lands for the purposes of operating and maintaining its underground natural gas storage facility, provided that any damage which may be done by Plaintiff in future entries for the aforesaid purposes will be compensable to Defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States of America, Guardian of restricted interests in said lands, have and recover judgment against Plaintiff for the use and benefit of certain Creek Indians in the amount of $30,358.49 which is determined to be the compensation and damages to which said Defendant Creek Indians are entitled by reason of the taking and appropriation of the easement and rights hereinbefore described, and that the Clerk of this Court be and hereby is directed to disburse said sum as follows:

Tract 1:

Agnes Lucas now Wesley Rt. 1, Wetumka, OK 74883	$ 2,543.86
Louis Hobia Rt. 1, Wetumka, OK 74883	$ 543.87
Susie Lasley now Martinez Rt. 1, Wetumka, OK 74883	$ 543.87

Tract 2:

Agnes Lucas now Wesley ..... $ 543.87
Rt. 1, Wetumka, OK 74883

Louis Hobia ..... $ 543.87
Rt. 1, Wetumka, OK 74883

Susie Lasley now Martinez ..... $ 543.86
Rt. 1, Wetumka, OK 74883

Tract 3:

Beaden Hope ..... $ 815.80
Rt. 2, Box 287, Henryetta, OK 74437

Tract 4:

Bureau of Indian Affairs Individual Indian)
Money Account of Amos Yargee, 7/8 Blood)-$ 1,631.60
Creek NB-940, Deceased)
c/o Area Director, Bureau of Indian Affairs
Federal Building, Muskogee, OK 74401

Tract 5:

Bureau of Indian Affairs Individual Indian)
Money Account of Frances Joyce Wesley now)-$13,967.20
Wood, Full Blood Creek-Choctaw, unenrolled)- 8,994.80*
c/o Area Director, Bureau of Indian Affairs $ 4,972.40
Federal Building, Muskogee, OK 74401

*This amount distributed pursuant to Order dated August 22, 1975.

Tract 6:

Yarner Tebe ..... $ 543.87
Rt. 1, Sasakwa, OK 74867

Arthur Tebe ..... $ 543.87
601 North Miller, Oklahoma City, OK 73120

Polly Tebe now Brown ..... $ 543.87
Rt. 1, Holdenville, OK 74848

John Tebe ..... $ 543.87
Rt. 1, Box 184, Konawa, OK 74849

Charlie Tebe ..... $ 543.87
Rt. 1, Sasakwa, OK 78467

Harry Carbitcher ..... $ 135.96
728 S.E. 13th Street, Oklahoma City, OK 73125

Sampson Harjo ..... $ 135.96
526 West 11th Street, Holdenville, OK 74848

Bureau of Indian Affairs Individual Indian)
Money Account of Malinda Harjo a/k/a Ma-)-$ 135.96
rinda Harjo, ¾ Blood Creek-Seminole,)
unenrolled
c/o Area Director, Bureau of Indian Affairs
Federal Building, Muskogee, OK 74401

Tract 7:

Molly Mae Brown ..... $ 1,110.70
Rt. 1, Holdenville, OK 74848

Buster Brown ..... $ 1,110.69
Rt. 1, Holdenville, OK 74848

Josephine Brown ..... $ 1,110.69
Rt. 1, Holdenville, OK 74848

Wisey Mae Brown ..... $ 1,110.69
Rt. 1, Holdenville, OK 74848

Tootsie Brown ..... $ 1,110.69
Rt. 1, Holdenville, OK 74848

s/ Joseph W. Morris
DISTRICT JUDGE

APPROVED AS TO FORM:

s/ Andrew Wilcoxen
Andrew Wilcoxen
Attorney for Plaintiff

s/ Edwin L. Gage
Edwin L. Gage
Assistant United States Attorney
United States of America,
Guardian of restricted
interests of certain Creek Indians

FILED
SEP 7 1976
LEWIS L. VAUGHN
Clerk, U. S. District Court
By
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma corporation, Plaintiff,	)	
-vs-	)	No. 73-186-C
An Easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma,	)	
AND	)	
The United States of America, et al., Defendants.	)	

ORDER DENYING MOTION TO
SET ASIDE JUDGMENT

Louis Hobia, a/k/a Louis Hopia, Susie Martinez, Agnes Lucas now Wesley, and Beaden Hope, restricted Creek Indians, have filed a motion to set aside judgment and order of distribution filed on August 28, 1975, pursuant to a stipulation and joint motion of the plaintiff and the defendant, the United States of America, guardian and owner of the legal title to said land for the use and benefit of these movants. Movants have filed a brief in support of the motion. The United States and the plaintiff have responded.

It is the contention of the movants that the judgment and order of distribution is void because the Secretary of Interior was not made a party defendant in this condemnation proceeding and that accordingly this Court did not have jurisdiction, the United States Attorney on behalf of the United States was not authorized to enter into the agreed stipulation as to just compensation and that the judgment is void.

The United States was joined as a defendant in this condemnation action, which action was brought pursuant to the provisions of 25 U.S.C. § 357. From inception the United States, as guardian of the interests of the movants who now seek to set aside this judgment, vigorously represented their interests. The judgment entered by this Court was rendered at the joint request of the plaintiff and the United States in its capacity as guardian for these movants.

The contention of the movants that the Secretary of Interior was an indispensible party to this action and that this Court was without jurisdiction is without merit. The law plainly is that the United States of America, not the Secretary of Interior, is an indispensable party. *Town of Okemah, Oklahoma* v. *U. S.*, 140 F.2d 963 (10th Cir. 1944).

The motion to set aside the judgment is denied.

ORDERED this 7th day of September, 1976.

s/ Joseph W. Morris
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit
NOV 14 1977
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 76-1647, 76-1648 and 76-1972

TRANSOK PIPELINE COMPANY, an Oklahoma corporation,

Plaintiff-Appellee,

MAXWELL DARKS, MARVIN OLIVO, AGNES LUCAS NOW WESLEY,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 73-186)

Submitted: September 29, 1977

Andrew Wilcoxen (Kenneth W. East, on the brief), for Plaintiff-Appellee.

Carl Michael Smith and Robert G. Grove for Defendants-Appellants Maxwell Darks and Marvin Olivo.

Gary P. Snow for Defendant-Appellant Agnes Lucas now Wesley.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

The appellee Transok Pipeline Company brought this condemnation suit against Marvin Olivo, Maxwell Darks, and Agnes Lucas now Wesley, and a number of others. The purpose of the action was to condemn an easement for the underground storage of natural gas, pursuant to an Oklahoma statute, 52 O.S. § 36.3 et seq. Federal jurisdiction is said to arise under 25 U.S.C. § 357, which authorizes the condemnation of lands allotted in severalty to Indians in the same manner as lands owned in fee. Jurisdiction as to appellants Darks and Olivo, who are not Indians, rests on the fact that a number of restricted Indians, including the appellant here, Lucas now Wesley, and the United States government, the fee holder in trust of Indian lands, are all named as defendants. Darks' cotenant in one tract and the mineral owners in his and Olivo's property are restricted Indians. This presents a somewhat tenuous problem with respect to pendent jurisdiction over state claims against persons other than the defendants on the federal claim, where a common nucleus of fact is present in both the federal claims and the state claims.

The Indian defendants were represented by the United States Attorney for the Eastern District of Oklahoma. On August 22, 1975, the Assistant United States Attorney representing the Indian defendants and the attorney for Transok entered into a stipulation that there was no issue to be submitted to a jury. Judgment was entered in accordance with a stipulation as to the amount, and it was directed that this be distributed among the individual defendants. The appellant Lucas (now Wesley) signed a stipulation which she received in the mail and accepted the check that accompanied it. Now she claims that she did not fully understand the stipulation and had no contact with the attorney who represented her. On August 23, 1976, her effort with three other restricted Indian defendants to set aside the judgment was denied.

The Olivo and Darks cases were submitted to the jury on August 25, 1975, and verdicts were returned which the trial court held, on motion for new trial, to be excessive. A new trial was granted and at the second trial the awards were much less.

Darks was the owner of a one-half surface interest in 80 acres which was in tract 1. He owned the entire surface interest in the 80 acres of tract 2.

Olivo was the owner of a surface interest in tract 6, which was 160 acres. The mineral rights as to the Darks and Olivo tracts were owned by restricted Indians (so Darks and Olivo were seeking compensation for the diminution of their surface rights).

The evidence disclosed that the Darks' property here considered was part of a larger cattle ranch. The evidence also showed the land to be primarily suitable for farming and ranching. However, there was somewhat wooded area and a lake on the property. There was at least a contention that some of the area around the lake was suitable for residential development. Also, on the property was an abandoned oil and gas well and tract 2 was subject to an oil and gas lease.

The Olivo property was also primarily used for range and agriculture, and there was at least some possibility of residential development in the wooded parts of it. The Olivo property was also subject to oil and gas leases and had a pipeline across it. Olivo's testimony was that the new easement, the subject of the present litigation, would increase the pressure in the pipeline and that it might cause some danger.

The first jury award was for Darks, tract 1, $12,000; Darks, tract 2, $32,000; Olivo, tract 6, $48,000. As we have said, these verdicts were vacated and a new trial was granted to Transok. The court held that the verdicts were excessive when considered in the light of the fact that a

full range of uses remained to the owners. The motion for new trial of Darks with respect to certain damage issues was denied.

The second jury verdict which was rendered May 21, 1976, made the following awards: Darks, tract 1, $1,000; Darks, tract 2, $2,000; Olivo, tract 6, $5,600.

The appeal of Darks and Olivo seeks review of the court's action in vacating the first verdict and seeks to set aside the second verdict. However, the main thrust of the appeal is that the trial court erred in granting Transok's motion for new trial following the first awards, and that the court erred in certain of its rulings on evidence and discovery in both trials.

Wesley seeks review of the order denying the motion to set aside the judgment which was entered as a result of her acceptance of the check. She claims that she did not understand it and that the court lacked jurisdiction as to her and the other Indian defendants.

Specifically, Olivo seeks reversal on the following grounds:

1. That there is no federal jurisdiction as to him.

2. That the Oklahoma substantive and procedural law applied by the trial court as to the taking of property by eminent domain violated the Constitution of the United States.

3. That the trial court erred in granting a new trial on account of excessiveness of damages and overruling Darks' motion for a new trial.

4. That there was error on the part of the trial court in refusing to permit the presentation of evidence on damages including the value before and after the taking of Olivo's portion of the gas storage formation, and (b) value before and after taking of Olivo's wells and casing to the subsurface formation.

The specific contentions of the defendant-appellant Darks are the same as those raised by Olivo and, in addition, he argues other points such as lack of necessity for the taking under Oklahoma law. He also makes detailed arguments with respect to the trial court's refusal to allow at the second trial evidence as to severance damage and trespass damages to Darks' land prior to the date of taking.

I.

We first consider the argument that the district court did not have jurisdiction over the Indian defendants because the Secretary of the Interior was not served and was an indispensable party. For this proposition some language contained in United States v. Oklahoma Gas & Elect. Co., 127 F.2d 349, 354-55 (10th Cir. 1942), *aff'd*, 318 U.S. 206 (1943), is relied on. The court in that case did say by way of dicta that the Secretary is an indispensable party. It cited Minnesota v. United States, 305 U.S. 283 (1939), which contains a statement that the United States is an indispensable party to such an action. The Supreme Court did not refer to this issue in affirming the *Oklahoma Gas* decision. In a later case, Town of Okemah v. United States, 140 F.2d 963 (10th Cir. 1944), this court referred to the United States as an indispensable party and did not mention the Secretary as being an indispensable party. In accord is Semple, *Oklahoma Indian Land Titles Annot.* § 802 at 546 (1952). It is to be concluded that that one statement in *Oklahoma Gas* is not authority for the proposition that the Secretary is indispensable.

The appellants also rely on the Act of May 27, 1908, § 6, 35 Stat. § 312, which authorizes representatives of the Secretary to counsel and advise all allottees of restricted lands and to take such steps as are necessary to protect them or assist said allottees in acquiring and retaining possession of their restricted lands. Another statute, that of August 4, 1967, 61 Stat. § 731, authorizes the attorneys provided for by the Act to represent Oklahoma Indians before

state courts of Oklahoma. This provision does not purport to deal with representation of Indians in federal court and does not state that Indians must be represented by these attorneys.

The further statutory provision relied on is § 3(c) of the Act of August 4, 1947, 61 Stat. § 732, which states that no proceeding in which members of the Five Civilized Tribes are parties may be removed to a federal court except upon the recommendation of the Secretary. This, however, falls short of requiring the Secretary to be a party.

We conclude that all necessary parties were served and that the Indian defendants were properly represented. On this issue the trial court found that the government vigorously represented the Indian interests. Appellant Wesley (or Lucas) has not claimed otherwise.

Nor do we agree with counsel for the appellants that the approval of the Secretary was a prerequisite to condemnation. There is one statute, Section 11, Act of August 4, 1947, 61 Stat. § 734, which provides that no order of the Corporation Commission under the "oil and gas conservation laws of Oklahoma," affecting restricted Indian land shall be valid until submitted to and approved by the Secretary of the Interior. In this case it does not appear that the Secretary refused to approve the order nor does it appear that § 11, *supra*, makes approval by the Secretary necessary to this condemnation action.

Certification by the Corporation Commission under the "oil and gas conservation laws," 52 O.S. §§ 81-287, is designed to regulate the oil and gas industry. While a certificate is also required for condemnation of underground storage facilities under a different chapter, 52 O.S. § 36.4, formal condemnation proceedings in federal court are necessary before it can have any effect as to Indian land. Similarly, the consent of the Secretary is required in order for a state to acquire the rights of way across allotted lands under 25 U.S.C. §§ 311, 312, 319, 321, 323, but § 357 does not

impose such a requirement. Nicodemus v. Washington Water Power Co., 264 F.2d 614 (9th Cir. 1959); United States v. Oklahoma Gas & Elect. Co., *supra*. Undoubtedly Congress considered the safeguards available in federal judicial proceedings to be sufficient so that the permission of the Secretary was not required.

The other points such as the inadequacy of the Oklahoma Corporation Commission Order under 52 O.S. §§ 36.3 (b) and 36.4(b) are unfounded. Nor is there merit in the contention that § 357 only authorizes condemnation of the interests of original allottees and not the interest of heirs of allottees. *Oklahoma Gas, supra,* 318 U.S. at 207; Town of Okemah v. United States, 140 F.2d 963, 965 (10th Cir. 1944). Nor is the fact that the language in § 1, Act of May 27, 1908, 35 Stat. § 312 refers to the exercise of right of eminent domain over allotted lands, thereby precluding the taking of a subsurface facility. Such a reading of the statute would produce a ridiculous result.

II.

Both Darks and Olivo argue that there can be no jurisdiction because subject matter jurisdiction exists only because of 25 U.S.C. § 357, which allows the condemnation of lands allotted in severalty to Indians. Even if the United States court can exercise jurisdiction over the Indians, Darks maintains as does Olivo that there can be no jurisdiction exercised over them.

The appellants rely on United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). Particularly they rely on the language in United Mine Workers that if the state issues substantially predominate whether in terms of proof, scope, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice to be tried in state courts. The trial court reasoned that § 357, *supra*, authorized the condemnation of any lands in which restricted Indians held an interest.

The trial court said that even if the surface of the land were considered a separate subject matter under § 357, the court had pendent jurisdiction over the condemnation of Darks' and Olivo's lands. It further stated that it would be a waste of time to dismiss the non-Indian defendants after two years of litigation.

It should be noted that the Indian defendants settled before the trial.

We do not rely solely on the trial court's first theory that § 357 confers federal jurisdiction over non-Indians who hold an interest in land in which allotted Indians also hold an interest.

In United Mineworkers v. Gibbs, *supra*, the Supreme Court said that for pendent jurisdiction to exist, the federal claims must have substance sufficient to confer subject matter jurisdiction on the court. The Court laid down the requirement that the state and federal claims must derive from a common nucleus of operative fact, and the additional test that was used was whether the claims are such that the plaintiff would ordinarily be expected to try them all in one judicial proceeding. It added that pendent jurisdiction may be exercised by the court in a particular case when "Its justification lies in considerations of judicial economy, convenience and fairness to litigants." *Id.* at 726.

In *Gibbs* there was no question of different defendants, but subsequent cases from the circuits have extended the *Gibbs* reasoning to pendent jurisdiction over state law claims against defendants over whom there is no independent basis of federal jurisdiction if the claim arose out of the same nucleus of operative fact as the federal claims applicable to another defendant. *See* Curtis v. Everette, 489 F.2d 516 (2d Cir. 1973), *cert. denied,* 416 U.S. 996; Almenares v. Wyman, 453 F.2d 10 (2d Cir. 1971), *cert. denied,* 405 U.S. 944; Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); F. C. Stiles Contracting Co. v. Home

Insurance Co., 431 F.2d 917 (6th Cir. 1970). *But see* Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969).

In a 1976 case, Aldinger v. Howard, 427 U.S. 1 (1976), the Supreme Court discussed the subject of pendent party jurisdiction in the context of an action alleging violation of civil rights under 42 U.S.C. § 1983. A county employee there sued her supervisor, the commissioners and the county itself, claiming that her discharge violated her constitutional rights. The problem arose because there was no federal jurisdiction over the county under 28 U.S.C. § 1343(3) because the county was not suable as a "person" under § 1983.

The Court disapproved of adding a completely new party over whom the court would have no power under the Civil Rights Act. The Court thought that this was an unwarranted extension of the pendent jurisdiction doctrine. At the same time the Court was careful to limit its decision to jurisdiction under § 1343(3) and § 1983, *supra*. The Court said that other alignments of parties and claims might call for a different result, such as with federal torts claims where the grant of jurisdiction is exclusive against the United States, for only in the federal court could all of the claims be tried together.

Cases decided since the *Aldinger* case have construed it somewhat narrowly. *See* Ayala v. United States, 550 F.2d 1196 (9th Cir. 1977); Long Prairie Packing Co. v. Midwest Emery Freight, 429 F. Supp. 201 (D. Mass. 1977). This attitude is not necessarily justified from a reading of *Aldinger*, which can be read to indicate that there is power to exercise pendent party jurisdiction unless Congress has expressly or impliedly negated such power in a particular jurisdictional context. *See* Comment, 77 Calum. L. Rev. 127 (1977).

The federal claims must, however, be substantial. In our case the claims quite clearly arise out of the same factual nucleus and normally a condemnor would seek to have all interests in the property adjudicated in one action.

Furthermore, our case is similar to the test discussed in *Aldinger*; Under § 357, there is exclusive jurisdiction in federal court to try the federal claim, whereby there can be a trial of all of the claims only in federal court.

We finally consider whether there was an abuse of discretion in exercising pendent jurisdiction in this case by trying the non-Indian cases after the settlement of the Indian ones.

While there was language in *Gibbs* that if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Nevertheless, late cases seem to be contrary to this dictum. *See* Rosado v. Wyman, 397 U.S. 397, 404 (1970), where the Court ruled that mootness as to the federal question did not deprive a federal court of power to hear pendent state claims. The court said: "Mootness, . . . may not occur until after substantial time and energy have been expended looking toward the resolution of a dispute that plaintiffs were entitled to bring in a federal court." *Id. See* Hagans v. Lavine, 415 U.S. 528, 545-550 (1974). Therefore, the *Gibbs* dictum is not a restriction on the court's power but rather is a guide to the exercise of its discretion. It would seem that the state claim would not have to be dismissed as long as the federal claim is not dismissed for insubstantiality. Stated differently, unless insubstantiality is the situation, the federal court would have the power to decide the pendent claim. *See* State of Arizona v. Cook Paint & Varnish Co., 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 1327 (1977); Klaus v. Hi-Shear Corp., 528 F.2d 225 (9th Cir. 1975); Kavit v. A. L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974); Brunswick v. Regent, 463 F.2d 1205 (5th Cir. 1972); 3A Moore's Federal Practice, ¶ 18.07 [1.—3] & n. 41.

Exercise of power over the state claims has been approved despite dismissal of the federal claims where substantial amounts of time and energy have been spent in the

case. *See* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973). In that case a number of motions had been heard and a special master in charge of discovery had been appointed. The motion to dismiss was made on the eve of trial. Retention was upheld. *See also Klaus, supra; Kavit, supra.*

In the case at bar the federal claims are substantial. The complaint had been filed in July 1973, and for over two years the court had heard and decided motions and appointed commissioners to determine just compensation. The federal claims were settled in August 1975, just before trial. Finally, this would be a bad time to dismiss non-Indian claims after four years and two jury trials. It would be a shocking waste of time and money now to require this cause to be relitigated in the state court.

We have concluded that the trial court did not err in granting Transok motion for a new trial because of excessiveness of the verdicts.

The trial court properly instructed the jury as to the proper measure of damages and submitted summaries of the evidence and advised the jury that the verdict as to each tract had to fall within the ranges of just compensation as shown by the summaries submitted. In fact the verdicts turned out to be within the guidelines contained in the summaries. However, the amounts in each instance crowded the outside limit set in the range of figures furnished by the experts. It was because of this that the court ordered a new trial. The judge did so on the basis of this court's decision in Holmes v. Wack, 464 F.2d 86 (10th Cir. 1972), in which the breadth of the trial court's discretion to grant or deny a new trial was emphasized. *See also* Harris v. Quinones, 507 F.2d 533 (10th Cir. 1977).

Appellants would have us now hold that the trial court was in error in not offering as an alternative to the motion for new trial a proposal for a remittitur. They say that this was required. We disagree. If a remittitur is offered, the

alternative which is, so to speak, threatened is the granting of a new trial. It does not follow from this that every time a new trial is ordered it also must be accompanied by a proposal for remittitur.

A distinction is to be drawn between appellate review of a grant of a new trial and review of denial of a motion for new trial. In the latter, the appellate court may be less likely to reverse than in the former situation. Yet the standard is still abuse of discretion. *See* Taylor v. Washington Terminal Co., 409 F.2d 145 (D.C. Cir. 1969), *cert. denied,* 396 U.S. 835, where the court said that they would reverse the granting of a new trial for excessive verdict only where the quantum of damages found by the jury was clearly within the maximum limit of reasonable range.

To the same effect are Gleason v. Hall, 555 F.2d 514 (5th Cir. 1977); Ehret Co. v. Eaton, Yale & Towne, Inc., 523 F.2d 280 (7th Cir. 1975); 6A Moore's Federal Practice ¶ 59.05[5].

In the present case the appellants' witnesses testified to a total loss of value as a result of the taking of the easement, and Transok's witnesses indicated no substantial taking and need for compensation at all. The judge in granting the new trial said that both positions were wrong. Considering the very limited taking and considering the fact that the awards approach the high marks, we are unable to see that the trial court abused its discretion in granting the motion for new trial.

IV.

Finally, we consider whether the trial court erred in its ruling on the reception of evidence and its instructions.

The underground area sought to be condemned was 2,500 feet beneath the surface that underlay about 3,640 acres in Hughes County, which property was owned by about 25 owners, according to appellants' estimate. Only a

part of this formation was considered in this condemnation action. There are related actions in the state court. We see no shortcoming in the trial court's instructions. It fairly defined the standards to be followed in making the award.

As to the evidence:

Appellants offered evidence of the value of the entire formation of the gas storage reservoir. This was apparently on the theory that compensation should amount to a percentage of the total value of the reservoir equal to defendants' percentage of the surface area over the reservoir. Such a formula would constitute a measure based upon the value to Transok rather than the value of the property taken. That the latter is the law in Oklahoma is shown by McInturff v. Oklahoma Natural Gas Transmission Co., 475 P.2d 160 (Okla. 1970); Cases from other states are to the same effect. Home Gas Co. v. Miles,. 358 N.Y.S.2d. 846 (Sup. Ct. 1974); Midwestern Gas Transmission Co. v. Mason, 201 N.E.2d 379 (Ill. 1964).

Olson v. United States, 292 U.S. 246 (1934), is not relevant because here in contrast to *Olson* there is no possibility of the 25 owners combining to operate a storage facility so as to come within *Olson*. *See* 292 U.S. at 257.

Severance damages were sought based upon diminution in value of the entire ranch. The trial court instructed the jury to disregard this evidence. The court's exclusion of this was justified on the basis that the testimony as to reduction of the value of the entire ranch as a result of this easement was, to say the least, insubstantial. Nor did the trial court abuse its discretion in denying Darks permission to introduce evidence of alleged pretaking trespass.

The judgment of the district court is affirmed.

NOVEMBER TERM—December 12, 1977

Before The Honorable Robert H. McWilliams, Circuit Judge,
The Honorable James E. Barrett, Circuit Judge,
The Honorable William E. Doyle, Circuit Judge

TRANSOK PIPE LINE COMPANY,	)	
	)	
Plaintiff-Appellee,	)	No. 76-1647
	)	
vs.	)	No. 76-1648
	)	
MAXWELL DARKS, et al,	)	No. 76-1972
	)	
Defendants-Appellants.	)	

This matter comes on for consideration of appellants' petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy
Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

s/ Linda A. Carlson
Deputy Clerk

APPENDIX "C"

(Orders from companion cases)

FILED
MARCH 5, 1973

BEFORE THE CORPORATION COMMISSION OF
THE STATE OF OKLAHOMA

APPLICATION OF TRANSOK PIPE LINE COMPANY PURSUANT TO 52 O.S. 36.1 et seq. FOR A CERTIFICATE DECLARING THAT THE CHANNEL BOOCH FORMATION UNDERLYING NE/4 NE/4 SECTION 2, N/2 N/2 SECTION 1, TOWNSHIP 7N, RANGE 10E; E/2 SE/4 AND SE/4 NE/4 SECTION 35, S/2 AND NE/4 AND S/2 S/2 NW/4 SECTION 36, TOWNSHIP 8/N, RANGE 10E; SW/4 AND N/2 N/2 SE/4 AND N/2 SECTION 31; S/2 SW/4 AND SE/4 SECTION 30; N/2 NW/4 AND N/2 S/2 NW/4 AND N/2 N/2 NE/4 SECTION 32; S/2 AND NE/4 AND S/2 NW/4 AND NE/4 NW/4 SECTION 29; N/2 AND NW/4 SE/4 AND N/2 SW/4 AND N/2 S/2 SW/4 SECTION 28; S/2 SW/4 SE/4 AND SE/4 SE/4 SECTION 20; S/2 AND NE/4 AND SE/4 NW/4 SECTION 21; W/2 W/2 SECTION 22; W/2 NW/4 SECTION 27, TOWNSHIP 8N, RANGE 11E, HUGHES COUNTY, OKLAHOMA ARE SUITABLE FOR UNDERGROUND STORAGE OF NATURAL GAS AND THAT ITS USE FOR SUCH PURPOSES IS IN THE PUBLIC INTEREST.	CAUSE CD NO. 35868 ORDER NO. 96291

REPORT OF THE COMMISSION

ORDER CORRECTING ORDER NO. 95952

This cause came on for hearing before R. F. Thweatt, Trial Examiner for the Corporation Commission of Oklahoma, on the 16th day of January, 1972, in the Commission's courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission, for the purpose of taking testimony and reporting to the Commission.

At the time of the hearing, Mr. Roger R. Scott, Attorney, and Mr. Charles B. Crane, Attorney, appeared for the applicant, *Transok Pipe Line Company*; Mr. William C. Majors appeared for Diamond L., Inc., and Mrs. James Logan; Mr. Maxwell Darks, Attorney, Hubert Douglas, Jr., Miller D. Jones, Ernest Allen, Ms. Elizabeth Star, Bert Wininger, Beaden Hope, and Ms. Frances Wood appeared for themselves. Mr. Harvey Cody, Conservation Attorney, appeared for the Commission.

The Trial Examiner heard the cause and filed his report recommending that the application be granted; time was allowed within which exceptions might be filed to said report, and none having been filed, the Commission being in executive session and being fully advised in the premises, therefore finds as follows:

FINDINGS

1. That this is an application of Transok Pipe Line Company for a certificate declaring that the Channel Booch Formation underlying NE/4 NE/4 Section 2, N/2 N/2 Section 1, Townhsip 7N, Range 10E, E/2 SE/4 and SE/4 NE/4 Section 35, S/2 and NE/4 and S/2 S/2 NW/4 Section 36, Township 8N, Range 10E; SW/4 and N/2 N/2 SE/4 and N/2 Section 31; S/2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S/2 NW/4 and N/2 N/2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N/2 SW/4 and N/2 S/2 SW/4 Section 28; S/2 SW/4 SE/4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE/4 NW/4 Section 21; W/2 W/2 Section 22; W/2 NW/4 Section 27, Township 8N, Range 11E; Hughes County, Oklahoma, are suitable for underground storage of natural gas and that its use for such purpose is in the public interest.

2. That the Commission has jurisdiction over the subject matter herein and no protests have been entered to the granting of the application.

3. That the applicant, Transok Pipe Line Company, is an Oklahoma corporation engaged in the business of transporting and transmitting natural gas by pipeline within the State of Oklahoma for ultimate public use, and qualifies as a natural gas public utility as defined in 52 Okla. Statutes 36.1.

4. That the Channel Booch Sand underlying the NE/4 NE/4 Section 2, N/2 N/2 Section 1, T7N, R10E; E/2 SE/4 and SE/4 NE/4 Section 35, S/2 and NE/4 and S/2 S/2 NW/4 Section 36, T8N, R10E, SW/4 and N/2 N/2 SE/4 and N/2 Section 31; S/2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S/2 NW/4 and N/2 N/2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N/2 SW/4 and N/2 S/2 SW/4 Section 28; S/2 SW/4 SE/4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE/4 NW/4 Section 21; W/2 W/2 Section 22; W/2 NW/4 Section 27, T8N, R11E, Hughes County, Oklahoma, is a dry gas reservoir, and the volumes of native gas originally in place therein are substantially depleted.

5. That the reservoir which is sought to be used for the underground storage of natural gas is ideally suited for such purpose and has a greater value or utility as a gas storage reservoir for the purpose of insuring an adequate supply of natural gas for applicant's consumers and for the conservation of natural gas, than for the production of the relatively small volumes of native gas which remain

therein, and that such storage of gas is necessary to permit the orderly withdrawal of natural gas at periods of peak demand so as to make more readily available the natural gas reserves of the State of Oklahoma to the consumers of this State; will provide a better year-round market to the various gas fields within the area; will promote the public interest and welfare of the State of Oklahoma; will prevent waste and protect the correlative rights of mineral owners, and is in the public interest.

6. That the Channel Booch Sand underlying the properties described in the application may be reasonably expected to be penetrated by gas displaced or injected into the proposed gas storage reservoir.

7. That no gas from said Booch Sand formation is being used for the secondary recovery of oil.

8. That said Booch Sand formation is not being used by others for the injection, storage, and withdrawal of natural gas in the area of the lands above described; that 2 BCF of native natural gas remains in the reservoir.

9. That the Channel Booch formation aforementioned in this application is identified by the log on the Adelman No. 1-B Well, located in the center of the NW/4 NW/4 of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2496 feet and a base at approximately 2556 feet.

10. That due to inadvertence and oversight when Order No. 95952 was prepared, the Channel Booch Sand, though named, was not identified as to depth or as to a previously drilled well log in the reservoir area, and this Correction Order is being issued to correctly reflect the testimony at the time of the hearing.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of the State of Oklahoma as follows:

1. That the application of Transok Pipe Line Company for a certificate declaring the Channel Booch Formation underlying the

> NE/4 NE/4 Section 2; N/2 N/2 Section 1, Township 7N, Range 10E; E/2 SE/4 and SE/4 NE/4 Section 35; S/2 and NE/4 and S/2 S/2 NW/4 Section 36, Township 8N, Range 10E; SW/4 and N/2 N/2 SE/4 and N/2 of Section 31; S/2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S/2 NW/4 and N/2 N/2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N/2 SW/4 and N/2 S/2 SW/4 Section 28; S/2 SW/4 SE/4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE/4 NW/4 Section 21; W/2 W/2 Section 22; W/2 NW/4 Section 27, Township 8N, Range 11E, Hughes County, Oklahoma,

are suitable for underground storage of natural gas, and that its use for such purposes is in the public interest, and that said application be, and the same is by this order granted.

2. That said Channel Booch formation is identified by the log on the Adelman No. 1-B well located in the center of the NW/4 NW/4 of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2496 feet and a base of approximately 2556 feet, and that such stratum or formation is suitable for the underground storage of natural gas. That the evidence in this cause shows that there are approximately 2 BCF of native gas remaining in this reservoir.

3. That Transok Pipe Line Company is authorized and empowered to use and operate the Channel Booch Sand underlying the described lands for the purpose of underground storage of natural gas, all in accordance with and subject to the limitations of 52 Okla. Statutes 36.1 et seq.

4. That applicant, Transok Pipe Line Company, will be the owner of all natural gas injected into the said Booch Sand Formation underlying the above-described lands, and no person other than said applicant shall have the right to produce, take, reduce to possession, waste, or otherwise interfere with, or exercise any control over such gas: provided, however that the owner of said lands, or of other rights or interests therein shall have the right to drill through said formation in such manner as shall protect said formation against pollution and the escape of natural gas therefrom, and in accordance with such orders, rules and regulations as the Commission may make for the protection of such underground storage.

5. That this Order should be and is hereby declared to be the Certificate required by 52 O.S. 1961, Sec. 36.4, as a condition precedent to the filing of the application or petition for condemnation of Transok Pipe Line Company in the courts of the State of Oklahoma.

DONE AND PERFORMED this 5th day of March, 1973.

CORPORATION COMMISSION OF OKLAHOMA

s/ Charles Nesbitt
Charles Nesbitt, Chairman

Ray C. Jones, Vice Chairman

s/ Rex Privett
Rex Privett, Commissioner

ATTEST:

s/ Ed Overholser
Ed Overholser, Secretary

APPENDIX D

UNITED STATES DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

WASHINGTON, D.C. 20242

Mr. Maxwell Darks
1601 Southwest 77 Terrace
Oklahoma City, Oklahoma 73559

Dear Mr. Darks:

Your telegram of June 18 advises that you are interested in bidding on the gas storage rights under certain Indian lands in Hughes County, Oklahoma. You further advise that Transok Pipeline Company is also interested in obtaining these same storage rights and that it is now engaged in negotiations with officials of the Department of the Interior in an effort to secure said rights. The opinion is offered that Title 25, Code of Federal Regulations (Indian), requires condemnation action before fee ownership in Indian lands may be conveyed. Your telegram also states that you desire to enter into competitive bidding for the right to purchase the storage rights beneath these Indian lands.

Our Area Oil and Gas office, Tulsa, Oklahoma, has advised us that since early 1971, Transok has been negotiating with the Bureau of Indian Affairs, Area office, Branch of Realty, Muskogee, Oklahoma, regarding a gas storage agreement in Hughes County, Oklahoma. It is our understanding that the Oklahoma Corporation Commission, on January 17, designated the area as being logical for the use of gas storage project and that Transok and the Bureau of Indian Affairs are still in the negotiation stages. The latest meeting between the Bureau of Indian Affairs and Transok was scheduled for July 14.

Therefore it is suggested that you contact the aforementioned Bureau of Indian Affairs office concerning your in-

terest in the gas storage area and your desire to enter into competitive bidding for the gas storage rights.

Sincerely yours,

s/ Henry W. Creller
Acting Director

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

MUSKOGEE AREA OFFICE
MUSKOGEE, OKLAHOMA 74401

In Reply Refer to:
Real Property Management
Acq. & Disp.

Jan. 21, 1976

Mr. Maxwell Darks
313 Southwest 103 St.
Oklahoma City, OK 73139

Dear Mr. Darks:

In Cause No. CD 35868, the Corporation Commission of the State of Oklahoma issued its order No. 96291 dated March 5, 1973, finding among other things that the Channel Booch formation underlying certain lands in Hughes County, Oklahoma, is ideally suitable for underground storage of natural gas. This order was not approved by the Secretary of the Interior or his duly authorized representative.

Sincerely yours,

s Allan R. Tedwall
Deputy Area Director